Nos. 831-833

IN THE

Supreme Court of the United States

October Term, 1945

GUARANTY TRUST COMPANY OF NEW YORK, Trustee, TRUSTEES OF UNION COLLEGE IN THE TOWN OF SCHENECTADY, STATE OF NEW YORK, FRANK BAILEY, MARIE LOUISE BAILEY, MARIE LOUISE BAILEY and FRANK BAILEY as Trustees, JOHN VANNECK and PAUL C. MORAN as Trustees and EQUITABLE HOLDING CORPORATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

(And Other Cases as Shown on Page 1.)

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVIS POLK WARDWELL SUNDERLAND & KIENDL,
of Counsel.

HOLTHUSEN & PINKHAM,
of Counsel.

THOMAS O'G. FITZGIBBON and
PAUL P. EAGLETON,
For Guaranty Trust Company of New York, Trustee,
15 Broad Street,
New York 5, N. Y.

SPENCER PINKHAM,
For Trustees of Union College in the Town of Schenectady, State of New York, *et al.*,
5 Maiden Lane,
New York 7, N. Y.

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In the

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Petitioners,

v.

Securities and Exchange Commission,

Respondent.

[Number 8885 below]

Same

v.

Standard Gas and Electric Company and Securities and Exchange Commission,

Respondents.

[Number 8906 below]

Same

v.

Standard Gas and Electric Company,

Respondent.

[Number 8934 below]

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners are Guaranty Trust Company of New York, Trustee, Trustees of Union College in the Town of Schenectady, State of New York; Frank Bailey, Marie Louise Bailey, Marie Louise Bailey and Frank Bailey as Trustees, John Vanneck and Paul C. Moran as Trustees, and Equitable Holding Corporation. They pray that writs of certiorari issue to review the three judgments of the United States Circuit Court of Appeals for the Third Circuit, entered on September 14, 1945. Two of these, Nos. 8885 and 8934, reversed the order of the United States District Court for the District of Delaware disapproving the Section 11(e) plan, as amended, of Standard Gas and Electric Company under Section 11(e) of the Public Utility Holding Company Act of 1935 as not fair and equitable to debentureholders, and the third, No. 8906, affirmed the order of the District Court holding that the holders of debentures issued or assumed by Standard Gas and Electric Company are not entitled to contract redemption premiums.

Guaranty Trust Company of New York is Trustee under certain indenture agreements under which approximately $39,000,000 of notes and debentures were issued and are now outstanding. Petitioners, Union College, *et al.*, are the owners of $513,000 of notes and debentures of Standard Gas and Electric Company. They hold some of each issue outstanding, including the issues in respect of which Guaranty Trust Company is not Trustee.

The questions here are of general concern in the administration of the Public Utility Holding Company Act of 1935, touching (i) the relative treatment of senior creditors of the Company as against the treatment of the present stockholders who are to become the common stockholders of the recapitalized Company; (ii)) the power of

the Securities and Exchange Commission and the enforcement court to force creditors of a solvent company to accept speculative common stocks at appraised values in payment or partial payment of debt; (iii) whether in a Section 11(e) plan under the Act the holders of notes and debentures who have a contract right under the indentures to receive either (a) interest to maturity, or (b) a call premium, are entitled to compensation on account of such rights; and (iv) whether Section 11 violates the Fifth Amendment or is given an unconstitutional application by the Securities and Exchange Commission.

The Statute Involved

The pertinent provisions of Section 11 of the Public Utility Holding Company Act of 1935 (15 U. S. C. A. Sec. 79 k *et seq.*) are set forth in the annexed Appendix A.

Opinions Below

The Opinion of the Circuit Court of Appeals (R. 203) is reported in 151 F. 2d 326.

The Opinion of the District Court (R. 129a) is reported in 59 F. Supp. 274.

The opinions of the Securities and Exchange Commission are reported in SEC , Holding Company Act Release No. 5430 (R. 3a) and SEC , Holding Company Act Release No. 5070 (R. 29a).

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on September 14, 1945. By orders entered herein the time within which petitions for writs of certiorari might be filed was extended to and including February 11, 1945 (R. 221, 222).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Section 347).

Statement

Standard Gas and Electric Company (herein called "Standard") is a registered holding company under the Public Utility Holding Company Act of 1935 (herein called the "Act"). In 1941 the Securities and Exchange Commission (herein called the "Commission") entered an order directing Standard to divest itself of all of its holdings except its interest in the Philadelphia Company.* Standard is under no order of dissolution and no proceedings are pending to procure its dissolution.

Standard has outstanding approximately $59,000,000 of notes and debentures, three classes of preferred and one class of common stock. The notes and debentures held by some 19,600 holders (R. 184) are virtually the only debts of Standard.

On March 24, 1943, Standard filed with the Commission an application for the approval of a plan under Section 11(e) of the Act. This plan was rejected by the Commission (R. 3a) and Standard filed the plan now before this Court on August 29, 1944, and filed amendments to it on September 11 and November 6, 1944 (herein called the "Plan"). Under the Plan Standard proposes to retire all of the notes and debentures by the payment (as to each $1,000 note or debenture) of $304.95 in cash and the distribution of common stocks of five subsidiary operating companies valued in the Plan at $690, subject to a limited adjustment specified in the Plan. The adjustment, made under a formula restricted as to amount and time (R. 36a)

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* *In the Matter of Standard Power and Light Corporation and Standard Gas and Electric Company,* 9 SEC 862 (1941).

added $5.05 to the assigned value of $690.00.* Valuation hearings on the first plan and on the Plan were conducted before an examiner of the Commission for about thirty-five days.

Standard is thoroughly solvent and able to pay its debts. Its assets exceed its liabilities by at least 2 to 1 (R. 129a). The notes and debentures are entitled to the benefits of "negative pledge" clauses (Appendix B) which in general terms preclude Standard from disposing of assets unless the proceeds are used to liquidate notes and debentures or reinvested in other capital assets.

Although the notes and debentures have a call upon all of the assets of Standard until they are paid in full and in cash, nevertheless, the stocks to be delivered under the Plan constitute less than 35% of the assets of Standard and would be delivered in payment of 70% of the debt to the debentureholders; the stocks and cash together constitute less than 50% of the assets of Standard and would be delivered in full payment of the entire debt of the debentureholders (R. 31a, *et seq.*). The earnings available for dividends on the stocks to be delivered constitute approximately 40% of the earnings available upon the total

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Company	Number of Shares to be Distributed	Assigned Basic Value Per Share	Aggregate Basic Value
Oklahoma Gas and Electric Co.	12	$21	$252
Wisconsin Public Service Corp.	18	10	180
California Oregon Power Co.	5	24	120
Pacific Gas and Electric Co...	3	32	96
Mountain States Power Co. ..	2	21	42
Total aggregate basic value for shares to be distributed for each $1,000 principal amount of Notes or Debentures			$ 690.00
Add: Adjustment to date of Commission Opinion..			5.05
Cash Payment			304.95
Total			$1,000.00

assets of Standard (R. 31a, *et seq.*). It appears without contradiction in the record (R. 171a) that the very stocks to be delivered could themselves be underwritten and sold on the open market at prices "overall" better than the aggregate amounts at which they are valued in the Plan.

Accordingly, there is no question but that the notes and debentures could be paid in full and in cash without hardships or injury to anyone.

On the other hand, it appears that in order to convert the "package" of stocks into cash, under certain conditions the cost of so converting a $500 debenture would be as much as 7.4% of the principal amount (R. 169a). It further appears that debentureholders would be selling the stocks in an unsponsored market where they might or might not obtain the values assigned in the Plan (R. 169a). All of the stocks to be distributed under the Plan could be sold to underwriters by Standard at an expense not to exceed $2,700,000, which, in the aggregate, is an amount somewhat less than the possible aggregate cost to the debentureholders of converting the stocks into cash (R. 170a).

On March 2, 1945, upon application by the Commission for an enforcement order, the District Court filed an opinion in which it refused to enforce the Plan. It held (R. 129-150a) (a) that the notes and debentures were debts; (b) that creditors are essentially different from stockholders, having a right to be paid in dollars and having no aliquot interest in the corporate assets; (c) that the Act contains no language conferring power upon the Commission to vary the contracts of creditors where such contracts can be carried out; (d) that, in the absence of such specific statutory authority creditors, vested with an absolute priority, are entitled to cash, not speculative common stocks, and (e) that, even if the Act did confer bare power under proper circumstances, it is not fair, equitable,

necessary or appropriate to force creditors of a corporation, which can easily pay them in cash, to accept common stocks which may be worth far less or far more than the amount of their debt when received by them.

The District Court also held (R. 139a, 149a) that the debentureholders were entitled to receive only the face of their notes and debentures and not the call premiums.

Upon appeal by the Commission and Standard from refusal of the District Court to enter an enforcement order, and by petitioners here and one other from its holding in respect of the call premium, the Circuit Court of Appeals for the Third Circuit unanimously reversed (R. 203) the District Court and, thereby, the appellate court held (a) that the Act is a reorganization statute and the power in the Commission to adopt any form of plan, within the perimeter of equity and fairness, should be implied and (b) that the debentures are merely another type of corporate security essentially the same as a preferred stock, that they were not matured by impact of the Act and therefore, under the authority of *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624 (1945), it is fair and equitable to force the holders thereof to accept the stocks in partial substitution therefor. It affirmed as to the call premiums (R. 213).

Proceedings in the District Court Subsequent to the Mandates.

Mandates to the District Court issued on October 2, 1945. Two months later, on December 3, 1945, Standard filed a motion in the District Court to dismiss the pending application of the Commission filed November 18, 1944 to enforce the Plan. The purpose of the motion was to withdraw the Plan so that Standard could seek approval from the Commission to borrow money which, with cash funds available to Standard, would be sufficient to call for redemption all of the notes and debentures. This action was taken because, as Standard stated, it believed the stocks to be

delivered had on December 3, 1945 so increased in value that it was unfair to its stockholders to enforce the Plan. The Commission agreed that Standard has a unilateral prerogative *i.e.* a right to call the notes and debentures for payment in cash, and, accordingly, interposed no opposition to the motion. The District Court on December 29, 1945, Appendix C, p. 37, remanded the matters concerning the redemption to the Commission, although that Court retained jurisdiction of the Plan.

Certain debentureholders objected to the order of the District Court remanding this phase of the Plan to the Commission and have appealed from its order on the ground, among others, that the prior mandates of the Circuit Court precludes any action by the District Court except enforcement of the Plan. The order of the District Court provided that if the notes and debentures were not called within thirty days from its date, or such further time as the Commission might grant, the Commission might renew its application for enforcement of the original Plan.* It is now unknown what further action will be taken by Standard to redeem the notes and debentures. It may be argued by the Commission or Standard, or both, that this petition is moot. Unless Standard calls the notes and debentures for redemption and makes irrevocable provision for their payment within the time limited by the District Court, as extended by the Commission, it is, at the very least, possible that the Plan may be enforced against the debentureholders.

In the event that Standard calls the notes and debentures for redemption and makes irrevocable provision for their payment the petitioners will immediately inform this Court thereof and take such action as may be proper to terminate proceedings herein.

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* The Commission on January 28, 1946, granted Standard an additional twenty days extension of time within which to comply with the order of the District Court (*Holding Company Act Release No.* 6385).

Questions Involved

1. Does the Act, which does not expressly so provide, impliedly confer upon the Commission the power to affect the rights of senior creditors of a company which is solvent, both in the bankruptcy and the equity sense, by forcing such creditors without their consent to accept distribution to them of speculative common stocks at appraised values in satisfaction of a part of their debt?

2. Is a voluntary plan under Section 11(e) of the Public Utility Holding Company Act fair and equitable where the holders of notes and debentures, being the only creditors of a solvent company, are required to accept speculative common stocks in satisfaction of a major part of the debt without compensation for their loss of seniority of position and other investment rights?

3. In a Section 11(e) plan is a contract right of the holders of notes and debentures to receive either (i) interest to maturity, or (ii) a call premium, a valuable right for which they are entitled to compensation where the debtor company is under no order to dissolve?

4. Does Section 11 violate the Fifth Amendment or is it given an unconstitutional application by the Commission?

Reasons for Granting Writs

The administration of the Act affects substantially the entire public utility industry. Petitioners believe the foregoing questions to be of far reaching national importance. Decision of them may be expected to affect the form and substance of many plans relating to other public utility holding companies. This case presents the first instance in which the Commission approved satisfaction of indebtedness of a solvent public utility holding company by payment in other securities rather than in cash (R. 131a).

The Circuit Court has in effect held that the words "fair and equitable" in the Act have a meaning different from that which has been accorded them by this Court in equity and bankruptcy reorganizations; that the strict priority rule does not apply; and that the rights of creditors of a solvent registered public utility holding company are less than the rights of creditors of an insolvent company being reorganized in equity or under the Chandler Act. The Circuit Court has also sustained the finding of the Commission that, under the Act, senior creditors need not be compensated for change of status. The decision appealed from also determines that a construction of the Act so as to vest virtually unrestricted and arbitrary power in the Commission to affect the contract rights of creditors as approved in the Plan is constitutional.

We respectfully submit that this Court should determine whether these holdings by the Circuit Court of Appeals are correct.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript and record of all proceedings in the matters there numbered 8885, 8906 and 8934 and that each of the judgments and the mandate of such Circuit Court be reversed, and that your petitioners may have such other and further relief as may be just and proper.

THOMAS O'G. FITZGIBBON,
PAUL P. EAGLETON,
Attorneys for petitioner,
Guaranty Trust Company
of New York, Trustee

DAVIS POLK WARDWELL
SUNDERLAND & KIENDL,

HOLTHUSEN & PINKHAM,
Of Counsel.

SPENCER PINKHAM,
Attorney for petitioners,
Union College, *et al.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The Act does not confer power upon the Commission to force creditors of a solvent public utility holding corporation, which is easily able to pay its debts, to accept anything but cash in payment of such debts.

(a)

There is no specific provision in the Act (as there is in Section 77 and old Section 77B and the present Chapter X of the Bankruptcy Act) purporting to empower the Commission to vary the terms of the contracts of creditors.

The District Court said (R. 132a) that if Congress had intended to confer such power, it would have said so. The Circuit Court held (R. 209) that if Congress had not intended to confer such power, it would have said so.

We suggest that the proper test should be the usual one of necessity. In fact, the Act specifically provides that the Commission must, in order to approve a plan, find the plan "necessary to effectuate the provisions of subsection (b)". Subsection (b) refers to the fundamental purposes of the Act, *viz.* the simplification of the capital structures of public utility systems, the equitable distribution of voting power and the integration of their operating properties.

In any event, when implied, not express, provisions in a statute are under consideration, only those things will be added by implication which are essential to a realization of the fundamental purposes of the statute and to achieve a reasonable, not an absurd, result.

The District Court sitting as a trial court found (R. 139a, 147a) that payment in stocks rather than cash was

"not necessary or appropriate to carry out the purposes of the Act" nor, on the basis of this record, was there any doubt but that the debentureholders could be paid in full and in cash and a plan could be consummated which would achieve all of the objectives of the Act.

When corporations which are insolvent or unable to pay their debts are involved, bankruptcy processes are available. Bankruptcy presupposes the necessity of varying the rights of creditors. Section 11(e) presupposes solvency and ability to pay debts. Its purposes are simplification and integration and not reorganization.

We submit that the Circuit Court erred when it attempted to write into the Act an arbitrary power, not granted by Congress, on the part of the Commission to vary the rights of creditors in the face of clear evidence, supported by the District Court's findings, that there was no necessity for such variance.

(b)

The action of the Commission here, as sustained by the Circuit Court, constitutes an appraisal method for the determination of creditors' rights and satisfaction of such rights by distribution of other securities. Such action disregards many rights and the right of a creditor to have his obligation measured by the exercise of his contract rights.* Not only is there no authority in the Act for this, but the implication of such right would be to cast doubt upon the constitutionality of the entire Section 11(e). We submit that the appraisal method as applied here is a clear violation of the due process clause of the Fifth Amendment. *Cf. In re Preble Corporation,* 12 F. Supp. 1002 (S. D. Me., 1935, aff'd 84 F. 2nd 73); *In re Tennessee Publishing Co.,* 81 F. 2nd 463 (C. C. A. 6th, 1936) aff'd on other grounds (299 U. S. 18). These cases hold that the provisions of Section 77B providing for the

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*NOTE: See the negative pledge covenants Appendix B

discharge of dissenting senior obligations by the appraisal method is unconstitutional.

(c)

Nor is the case of *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624 (1945) in point. This Court there held that, as a matter of contract law, a dissolution order under the Act did not effect a "liquidation" within the meaning of the charter so as to entitle preferred stockholders to par plus accrued dividends. We submit that, if the majority of this Court had agreed with the minority that the impact of the Act constituted a "liquidation", the entire Court would have held, under the absolute priority rule (*Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, *Consolidated Rock Products Co.* v. *Dubois,* 312 U. S. 510), that the preferred stockholders were entitled to take all. We find nothing in the *Otis* case indicating that the rights of a creditor and a preferred stockholder are essentially the same. On this matter the District Court said (R. 133a):

> "A holding that the creditor here is entitled to cash if his debt is to be paid is not in conflict with the doctrine announced in *Otis & Co.* v. *SEC,* U. S. , for the relation of a creditor to a solvent company is quite different from the relation that exists between the stockholders *inter sese.*
>
> In a case of preferred stock vs. common stock, such as was involved in *Otis & Co.* v. *SEC,* preferred does not necessarily receive its contractual liquidating rights because where simplification by nominal (but not actual) liquidation is compelled under the Act, charter provisions do not apply. That being so, claims of preferred are not matured and are consequently not a debt. [Footnote 8 is here omitted] In the case of bondholders, it is elementary a debtor-creditor relationship exists from the time the bond is issued. The claim of a bondholder may not always be matured in the sense that he can demand payment, but his is always a matured obligation in the sense that debt exists *eo instanti* and from the time of its contractual conception."

POINT II

Even if the Act be construed to confer power upon the Commission to vary the contracts of creditors, the present plan is not fair, equitable, necessary or appropriate.

(a)

The Act specifically requires findings that the Plan, to be enforceable, be fair, equitable, necessary and appropriate.

There is no substantial evidence in the record to justify the Commission's finding that the Plan is necessary. The District Court refused to find that the Plan was appropriate (R. 147a).

As we have seen the District Court has found and the record is clear that the debentureholders could be paid in cash, in accordance with their contract, without hardship or injury to anyone.

The words "fair and equitable" have a well defined meaning both in equity and bankruptcy reorganization law. They are words of art and connote, among other things, the strict priority doctrine. *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106.

Since the decision of *Otis & Co.* v. *Securities and Exchange Commission, supra,* there is no doubt that the term "fair and equitable" has the same meaning under the Act that it has been given in equity and bankruptcy reorganization law. This Court there said:

> "Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be 'fair and equitable', incorporates the principle of full priority in the treatment to be accorded various classes of security interests."

Therefore, the fairness and equity of the Plan is to be tested by the standards heretofore established by this Court. Among such standards are those established in *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510 (1941), that "full compensatory provision must be made for the entire bundle of rights which the creditor surrenders". Such standards also include the principle stated in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad,* 318 U. S. 523 (1943), that where junior interests participate in a plan, the Commission and the Court should determine *what* the senior security holders should receive "in addition to a face amount of inferior securities equal to the face amount of their old one, as equitable compensation, qualitative or quantitative, for the loss of their senior rights". Thus, the words "fair and equitable" include not only the doctrine of strict priority, but also include the principle that senior creditors are entitled to compensation for their entire bundle of rights, and further, that where junior interests participate in a plan, equitable compensation must be made to a creditor for the loss of senior rights.

An application of these principles to the Plan in this proceeding requires a consideration of the rights of the debentureholders and the measure of the compensation they receive for those rights. They have the right to be paid in cash in full at various maturity dates, which range from 1948 to 1966. Until maturity they have the right to receive interest at the rate of 6% per annum, unless prior thereto the debentures are called for payment and in that event, with respect to certain issues, call premiums are also payable. They have in effect security of 2 to 1 for payment of the debentures by operation of the negative pledge covenants.

The Plan provides for payment in full to debentureholders only if we assume that the distribution of the

common stocks of the five operating companies sometime in the future is equivalent to payment in cash.

The Circuit Court found that the bundle was the equitable equivalent of the notes and debentures on the ground that "owning the junior equities is no more speculative than the promise of the corporation whose assets consist of such equities" (R. 213). This is demonstrably unsound. A house which has been appraised at $5,000 is obviously not the equitable equivalent of a $5,000 mortgage on two houses that have been appraised at $5,000 each. The debentureholders have a call on all, not 50%, of the assets of Standard.

Even in equity or bankruptcy reorganization, which presupposes inability to pay debts, the superior rights of a creditor must be recognized by giving additional compensation where he is demoted. *Consolidated Rock Products Co.* v. *DuBois, supra.* The Commission's opinion (R. 94a-97a) shows that the Commission, while paying lip service to the equitable equivalent and strict priority rules, departs therefrom by depriving the debentureholders of their right to receive both principal and interest in cash and appraises them out of their senior position with common stocks and cash. It gives the debentureholders nothing for their call premiums and refuses to compensate them because of the loss of "senior rights". Surely, creditors of a solvent corporation upon whom a plan is being forced, without vote or representation, under the Act, are entitled to treatment at least equal to that of a creditor of an insolvent corporation being reorganized under Chapter X of the Bankruptcy Act.

POINT III

The debentureholders are entitled to their call premium or the equitable equivalent thereof.

The right of the debentureholders to receive interest to maturity or in the alternative the call premiums (R. 151a-166a), is a contract right of equal dignity with their right to receive the principal of their debentures. The call premium is a device for the benefit of the debtor so that it may, by paying the premium, eliminate its obligation to pay interest to maturity. The Plan (R. 37a) authorized a three year bank loan of $12,000,000 to bear not more than 3% interest. If this loan were outstanding for a three year period Standard would effect an interest saving of $1,080,000. The total call premiums on all of the notes and debentures amount to approximately $995,000. The Plan deprives the debentureholders of this clear right without compensation. As this Court said in *Otis & Co.* v. *Securities & Exchange Commission, supra* (p. 468):

> "Enforcement of an overriding public policy should not have its effect visited upon one class with a corresponding windfall to another class of security holders."

The debentureholders are entitled to have their contracts performed as written. If, because of the Act, they are not so entitled, they can not be fairly and equitably deprived of this contract right by lip service and without just compensation therefor.

POINT IV

If the Act be construed as conferring power upon the Commission arbitrarily to strike down the contract rights of creditors, it is unconstitutional.

(a)

Valuable property rights of the debentureholders are destroyed without just compensation. These property

rights are taken under Section 11 for the sole purpose of creating theoretically ideal structures in the public utility field deemed to benefit the public generally. The taking of private property for such public purpose has been held by this Court to require a condemnation proceeding with payment of just compensation for the rights taken in order not to violate the due process clause. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935).

(b)

There is no lawful process whereby Standard, a solvent corporation, can repudiate a portion of the principal amount of its notes and debentures against the objections of the debentureholders as the plan filed under Section 11 purports to do. Section 11 is not an exercise of the bankruptcy power and cannot be effective as an exercise of that power because of the absence of the jurisdictional fact of insolvency and the lack of essential safeguards such as the requirements of a right to a hearing and the vote of the creditors of a class affected. Creditors' rights can be modified against their objections only by reorganization or liquidation in bankruptcy, and the exercise of the bankruptcy power is dependent upon insolvency in either the bankruptcy or equity sense. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.,* 294 U. S. 648 (1935), *Wright* v. *Union Central Life Insurance Co.,* 304 U. S. 502 (1938). We have found no cases relating to the enforcement of the Sherman Act where the Courts have demoted senior creditors to a stockholder status.

This Court should determine the extent to which the rights of creditors can be affected under Section 11 of the Public Utility Holding Company, and whether or not creditors are entitled to just compensation for the rights so destroyed. The constitutionality of Section 11 of the

Act has not been ruled upon by this Court and *Otis & Co. v. Securities & Exchange Commission, supra,* falls short of determining the question since this Court there held that contract rights were not involved.

The foregoing arguments apply as well to the right of the debentureholders to receive interest to maturity or a call premium as to their right to receive their principal.

Conclusion

The decision below is a novel departure from doctrines clearly settled by this Court.

The questions are of public concern both from the standpoint of interpretation as well as the administration of the Act and have not been passed upon by this Court. Their determination will affect the investment rights of large numbers of owners of debt securities of public utility holding companies.

For the reasons set forth above, the writs should be granted.

Respectfully submitted,

THOMAS O'G. FITZGIBBON,
PAUL P. EAGLETON,
Attorneys for petitioner,
Guaranty Trust Company
of New York, Trustee

DAVIS POLK WARDWELL
SUNDERLAND & KIENDL,

HOLTHUSEN & PINKHAM,
Of Counsel.

SPENCER PINKHAM,
Attorney for petitioners,
Union College, *et al.*

Dated: February 11, 1946.

Appendix A.

Pertinent Provisions of the Holding Company Act of 1935.

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the

Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorgani-

zation plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or

administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

Appendix B.

Summary of Supplemental Agreement Dated as of April 1, 1938.

Standard's debentures (and the debentures assumed by it) are all affected by the provisions of the Supplemental Agreement dated as of April 1, 1938 (Applicant's Ex. No. 11). The Agreement was executed under and pursuant to authority of a certain plan of reorganization under 77 (B) of the Bankruptcy Act which reorganization was effected in 1938.

The Agreement, among other things, contains provisions which require Standard upon the sale, liquidation or other disposition of its "capital assets" to deposit with the Trustees under Standard's various trust agreements as a retirement fund, such part of the cash, Government securities and/or other securities or other property, respectively, not constituting "capital assets" as shall be received by Standard in such transactions. Standard's "capital assets" as defined in the Agreement include all of Standard's investments with the exception of its investment in the common stock of Pacific Gas and Electric Company. Any moneys, securities or other property not constituting "capital assets" paid or distributed in liquidation of a capital asset must be deposited immediately with the Trustees and if an event of default exists under the Trust Agreement or the Supplemental Trust Agreement, any payment or distribution constituting "capital assets" shall be deposited with the Trustees. The Agreement places restrictions on the use of any cash or securities on deposit in the retirement fund and if Standard shall not have withdrawn the cash and Government securities on deposit in the retirement fund within the first four calendar months succeeding the twelve calendar months immediately following the date of deposit in the retirement fund, such cash and the proceeds of sale of any Government securities are to be applied to the redemption of Standard's notes and debentures at the redemption prices then effective including the payment of such premiums as are provided in certain of the debenture issues.

Appendix B.

The Agreement also provides for the payment into a sinking fund on each May 1 of one-half of Standard's net income not in excess of $1,000,000; one-quarter of all net income in excess of $1,000,000, the total thereof not to exceed $1,104,742.50, less certain credits for notes and debentures retired, plus the net gains from sale, liquidation or other disposition of capital assets in transactions where Standard received cash or Government securities. Sinking fund moneys are to be applied to the purchase of notes and debentures at not exceeding the redemption price and any unexpended balance amounting to $10,000 or more remaining on the succeeding June 15 are to be applied to the redemption of notes and debentures at the current redemption prices which include as to certain issues, a call premium on the principal amount.

The Agreement also provides that any gains from sales of "capital assets" or other securities or from the retirement of notes and debentures will be credited to surplus unless law or good accounting practice require otherwise; no dividends, except those payable in stock, shall be paid out of amounts credited to surplus and no dividends, except those payable in stock, will be paid except out of earnings or earned surplus accrued after December 31, 1937.

The Agreement also provides restrictions against the mortgaging of any of Standard's property or the creation by Standard of any new and additional debt, or the loaning of its securities to anyone unless the existing notes and debentures are secured by a prior mortgage or pledge on all of the property and assets of Standard owned immediately prior thereto with the exception of current assets to be selected by the Company aggregating in value not more than $7,500,000.

Appendix C

The Opinion and Order of the District Court of December 29, 1945.

LEAHY, District Judge.

The plan of Standard Gas & Electric Company under Sections 11 and 18 (f) of the Public Utility Holding Company Act was here before and rejected. 59 F. Supp. 274. On appeal the Circuit Court reversed. 151 F. 2d 326. Since the receipt of the mandate, a Noteholder and owners of preferred and preference stocks have sought to intervene. The Noteholders, seeking the entry of the decree originally proposed, seek approval of the plan as fair and equitable and ask for enforcement. The stockholders contend that, since the original approval of the plan by the Securities and Exchange Commission in November, 1944, there has been a radical change of circumstances, i. e., the underlying stocks have greatly increased in value, and to permit the Noteholders to receive the package of stocks allotted to each of them, together with cash, would mean that each would receive substantially more than the face amount of his debt, plus premium plus interest.

A hearing was held on the stockholders' request for intervention. Before this matter was adjudicated, Standard requested the Commission to withdraw its application to this court for an order enforcing the plan. Alleging changed circumstances, Standard then filed a motion to have the plan declared unfair and inequitable and sought an order dismissing the application of the SEC for enforcement of the plan. Standard, in its supporting papers, states that it has a definite program for the prompt redemption of its Notes. At the hearing the SEC took the position that the particular part of the plan which affected Noteholders could be amended or changed *pro tanto*—i. e., Standard has the right to abandon its provision of payment to Noteholders by stocks and cash because until an order of approval of the original plan has been entered Standard has the right to call the Notes and redeem under the particular contract provisions of the indentures under which they were issued. The Trustee

under the indentures for the Noteholders stated its willingness to be paid off under the terms of the indentures. Other Noteholders took no position. Others took the position they had a "vested" right to receive the package of securities and cash called for under the plan because Standard has no legal right while its plan was pending to redeem its Notes; and one Noteholder argued that as she had purchased Notes at $1080 of their face amount in reliance upon her interpretation of the Circuit Court's opinion reversing the original holding here she was entitled to the original allocation of stocks and cash under the plan.

All parties have submitted forms of decree. One group of Noteholders asks for the entry of the decree first submitted and argues it should be followed in accordance with the mandate of the Circuit Court. The SEC suggests that Standard be given a period of 30 days to make a call for redemption in accordance with the provisions of the indentures and to file such applications or declarations with the Commission; and if the Notes are called the plan should be remanded to the Commission to hold hearings and receive evidence in order to determine whether any modification should be made in the plan for the treatment of the various classes of stock. If the Notes are not redeemed, then the SEC asks that an order be entered not inconsistent with the mandate of the Circuit Court. Standard seeks a decree holding the plan unfair and asks that the original petition of the Commission filed at Standard's request be dismissed. The intervenors on behalf of the preference and preferred stocks joined in Standard's prayers.

At the hearings which have been had since the Circuit Court filed its mandate last September, evidence has been submitted by affidavits, admissions and in the form of facts, of which I could take judicial notice, indicating that the portfolio securities of Standard, proposed under the plan to go to Noteholders, together with cash, have a current actual market value much in excess of the claims of the Noteholders. Estimates of such excess amounts started at $12,250,000 and stopped at $30,000,000. On the

basis of this prima facie showing the value of the shares of stock to be delivered to the Noteholders has increased to such an extent since the plan was approved by the SEC that it may be the plan should be re-examined to test whether it is fair and equitable to all the persons affected thereby. It follows that the value of the equity of Standard's stockholders has likewise increased in value since the matter was originally before the SEC, this court and the Circuit Court.

Since no final decree has ever been entered approving the plan Standard may call its Notes, but only under the supervision of the SEC. Since there can be more than one fair and equitable plan which complies with the requirements of the Act,[1] it is obvious that Standard may in the court of enforcement amend its plan, especially where the SEC approves. It is unnecessary to consider whether *Chenery* v. *SEC,* 318 U. S. 80, and *Jones* v. *SEC,* 298 U. S. 1, permit Standard by analogy to withdraw its plan completely and at will at this stage of the proceeding, or whether Standard would have such inherent power under the Act, because here we are concerned only with the power to call the Notes and the Commission concedes that Standard has such power.

However, I am not passing upon the method or provisions of a sufficient or satisfactory call. Since these matters are initially determined by the SEC in the usual case, I think the Commission should in this case supervise the method of the call as distinguished from the right to make it.

Numerous arguments were heard and briefs have been filed urging that the amended plan is now unfair because there has been a radical change of circumstances. Although there have been numerous offers of proof there has never been a full hearing relative to this contention. This contention, accordingly, is left undecided and the parties will have an opportunity to show that there has been such a radical change of circumstances that the decree enforcing the plan ought not to be entered if Standard for any reason fails

[1] *In re North Continent Utilities Corporation,* D. C. Del., 54 F. Supp. 527 at 530.

effectively to consummate the call. Most of the parties admit and it does not seem to be the subject of serious doubt that a court of equity after the receipt of a mandate may consider a radical change of circumstances which has occurred prior to the time of entering its decree.[2]

My conclusion is that Standard is authorized to make a call for redemption of the Notes outstanding in accordance with the provisions of the indentures pursuant to which the Notes were issued, provided Standard files appropriate applications with the SEC; and such redemption should be under the supervision of the Commission. Accordingly, this proceeding will be remanded to the Commission for further proceedings not inconsistent herewith. After the call of the Notes has been effectuated the Commission may fix a date for hearing and receive evidence, if such it considers necessary, in order to determine whether any modification should be made in the plan respecting the treatment of the various classes of stock of Standard. The SEC may make such findings as it deems proper to this court; or, it may or may not be that Standard will request the Commission to apply to this court for further enforcement of the plan. If, however, no call of the Notes is made within 30 days from the date of the entry of the decree herein, or within such further time as may be granted by the Commission, then the SEC may apply to this court to reinstate its original petition praying for such further orders or judgment as it may deem meet.

Before arriving at the conclusions above stated and before the entry of the order filed today, I gave serious consideration as to whether I was not following the mandate of the Circuit Court received here on October 3, 1945. That mandate instructed that further proceedings should be had not inconsistent with the Circuit Court's opinion, 151 F. 2d 326. I am unable to detect in any one

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[2] All but one of the parties in interest by admitting there may be radical and fundamental changed circumstances justifying a different plan admit the verity of the general proposition that there may be more than one fair and equitable plan.

instance how the further proceedings which I have directed should be taken could be in defiance of the mandate.

The order on the various motions entered this day provides that the intervenors may be made parties to this proceeding.

Dated: December 29, 1945.

ORDER

This Court having on March 2, 1945, filed its opinion, and on March 29, 1945, its decree, refusing to enforce a Plan under Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935, proposed by Standard Gas & Electric Company, and approved on November 15, 1944 by the Securities and Exchange Commission; and appeals from said decree having been taken to the Circuit Court of Appeals of the United States by the Commission and by Standard, and cross-appeals having been taken by representatives of certain holders of Notes and Debentures (hereinafter referred to as "Noteholders"); and said Circuit Court of Appeals having on September 14, 1945, filed its opinion finding that Noteholders could under the provisions of the Public Utility Holding Company Act of 1935 be required to accept portfolio securities of a holding company having a value equal to not less than the amount of their claims, and that a reorganization plan may be "fair and equitable" within the meaning of Section 11(e) of said Act which requires Noteholders to accept such securities in discharge of their claims; and said Circuit Court of Appeals having dated its mandate to this Court on September 14, 1945, which was later issued to this Court on October 2, 1945, reversing the judgment of this Court and remanding this cause to this Court for further proceedings not inconsistent with the opinion of said Circuit Court, and commanding this Court that "such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding"; and

Upon such remand to this Court, Christian A. Johnson, Al. P. Johnson and Jean Johnson, owners of Prior Preference and $4 preferred Stocks of Standard, having made a motion to intervene individually and also for the benefit of all owners of the $7 Prior Preference Stock, the $6 Prior Preference Stock and the $4 Preferred Stock of Standard, for the purpose of filing a pleading requesting in substance (1) that a supplemental hearing be had to receive proof of the unfairness of the plan by reason of drastically changed values; and (2) the entry of a decree either (a) disapproving the plan as not fair and equitable, or (b) remanding the plan to the Commission for reconsideration and redetermination in the light of the changed circumstances and other factors; and a hearing having been held before this court with respect to such motion on November 2, 1945, at which hearing Kent Cochran, Carl P. Dennett and Claude Pearce (owners of Prior Preference and $4 Preferred Stocks of Standard who had previously appeared in the proceeding in proper person) appeared through their counsel, who were also counsel for the proposed intervenors Johnson, et al., in support of the motion and pleading of the proposed intervenors; and

The Commission having brought on for hearing at the same time for settlement a proposed form of decree approving and enforcing the plan; and

The aforementioned owners of Prior Preference Stock and $4 Preferred Stock having appeared at said hearing on November 2, 1945, by their attorneys Philip W. Amram, Alfred Berman and Arthur G. Connolly, Esqs., and Guggenheimer & Untermyer; and the Commission having appeared by its attorney, David K. Kadane, Esq.; Standard having appeared by its attorneys, A. Louis Flynn and J. K. Javits, Esq., and Robert H. Richards, Sr. and C. A. Southerland, Esqs.; Guaranty Trust Company of New York, Trustee, having appeared by its attorneys, Davis, Polk, Wardwell, Sunderland & Kiendl and Thomas O'G. FitzGibbon and Paul P. Eagleton, Esqs.; Frank Bailey, Union College, et al., having appeared by their attorneys, Holthusen & Pinkham and Spencer Pinkham, Esq., and James R. Morford, Esq.; Standard Power &

Light Corporation having appeared by its attorneys, Seibert & Riggs, and Murray Taylor, Esq.; A. O. Stewart, et al., having appeared by their attorneys Pam, Hurd & Reichmann and Sydney K. Schiff, Esq.; and Albert J. Fleischmann, Esq., having appeared in his proper person.

All parties having been heard in extended oral argument and briefs having been filed and considered by the Court; and

Thereafter, but prior to any decision by the Court upon said matters Standard having filed on December 3, 1945 a motion praying this Court to enter an order (1) finding, adjudging and decreeing that the plan pending before the Court is unfair and inequitable; and (2) dismissing the application by the Commission for enforcement of the plan, and said motion having come on for hearing December 11, 1945, at which time the interested persons named above again appeared, together with A. David Schenker appearing in his proper person, and were heard in oral argument through their counsel, as stated, and in addition, Vallerie Lathrope Dauphinot, the owner of various Notes and Debentures (who is also seeking to intervene) having appeared and been heard through her attorney, Edwin D. Steel, Jr., and briefs having been filed and considered by the Court;

The Court having considered the entire record in this matter and having heard argument of counsel and being fully advised in the premises; and having heretofore filed its memorandum, this day, now makes the following

Findings of Fact

1. This Court has jurisdiction of this proceeding by virtue of the provisions of Sections 11 and 18(f) of the Public Utility Holding Company Act of 1935.

2. All persons whose rights are affected by the Amended Plan have had due notice and opportunity for hearing as provided by law.

3. Standard is a Delaware corporation registered as a public utility holding company under the Act.

4. The Commission heretofore made application to this Court by filing its petition at the request of Standard pursuant to Section 11(e) of the Act, for an order enforcing the Amended Plan. The Amended Plan, among other things, provides for the following treatment of the security holders of Standard:

(a) The holders of the various issues of notes and debentures of Standard and Standard Power and Light Corporation referred to above (which notes and debentures will be referred to hereinafter as "the notes and debentures") are to receive, for each $1000 principal of notes or debentures, $304.95 in cash and three shares of common stock of Pacific Gas and Electric Company, twelve shares of Common stock of Oklahoma Gas and Electric Company, five shares of Common stock of The California Oregon Power Company, two shares of Common stock of Mountain States Power Company and eighteen shares of Common stock of Wisconsin Public Service Corporation, all of which stocks have been assigned an aggregate value of $695.05 (which includes an adjustment of "basic values" of $5.05), without compensation for or on account of call premiums on the debentures.

(b) The holders of the $7 and $6 Prior Preference Stocks, as a single class, are to receive an aggregate of approximately 95% of a new issue of common stock of Standard in lieu of the presently outstanding $7 and $6 Prior Preference stocks and of all rights to dividends accumulated and in arrears thereon.

(c) The holders of $4 Preferred stock are to receive, as a class, the remaining aggregate of approximately 5% of the aforesaid issue of new common stock of Standard in lieu of the presently outstanding $4 Preferred stock and of all rights to dividends accumulated and in arrears thereon.

(d) The holders of common stock do not participate in the distribution of securities under the Amended Plan or otherwise.

(e) As between the $7 Prior Preference stock and the $6 Prior Preference stock, the division of new common stock is to be in the ratio of ten and one-half shares of new common stock for each share of $7 Prior Preference stock and all dividends accumulated and in arrears thereon to nine shares of new common stock for each share of $6 Prior Preference stock and all dividends accumulated and in arrears thereon.

5. Standard requested the Commission to withdraw its application to this Court for an order enforcing the Amended Plan.

6. The value of the shares of stock to be delivered to the Noteholders under the provisions of the Amended Plan has increased to such an extent since the Amended Plan was approved by the Commission on November 15, 1944, and since the entry by this Court on March 29, 1945, of a decree making certain Findings of Fact and Conclusions of Law relative to the Amended Plan, that it may require a reexamination of the Amended Plan to test whether it is fair and equitable to the persons affected thereby.

7. Evidence submitted in the form of affidavits and offers of proof, in the form of admissions of counsel, and in the form of facts, of which the Court was requested to and did take judicial notice, indicates that the portion of the portfolio securities of Standard, proposed in the Plan to be distributed to the Noteholders in partial discharge of their claims, have a current actual and market value substantially in excess of that part of the claims of the Noteholders to be discharged thereby. Estimates of the amount of such excess vary between a minimum of $12,250,000.00 and a maximum of $30,000,000.00.

8. Standard has proposed that in lieu of distributing said portfolio securities to the Noteholders, as provided in the Amended Plan, it proposes to call and redeem such Notes, in accordance with their terms, and it has established that it is attempting to make arrangements with responsible banking groups to obtain the cash for such purpose; and Standard will thereby discharge the claims of the Noteholders in accordance with their terms.

9. The program of Standard provides for the exercising by Standard of the option reserved to Standard, in the Notes and in the indentures pursuant to which they were issued, to redeem the Notes prior to their maturity. The "debentures" are redeemable at the principal amount thereof, the premiums thereon specified in the indentures and accrued interest to the date of redemption; the "notes" are redeemable at the principal amount thereof and accrued interest thereon, without the payment of any premium.

10. As evidence of its desire to redeem the Notes, Standard has made formal application to the Commission for the approval of a proposed loan and a program contemplating redemption and payment in cash of all of the outstanding notes and debentures.

11. Christian A. Johnson, Al. P. Johnson, and Jean Johnson, owners of Prior Preference and $4 Preferred stock of Standard having appeared individually and also for the benefit of all holders of the $7 Prior Preference Stock, the $6 Prior Preference Stock, and the $4 Preferred Stock of Standard, have filed a motion for leave to intervene in the proceedings, and have urged in oral argument and by briefs and memoranda, that the proposed plan is unfair and inequitable to the shareholders of Standard as a group vis-a-vis the Noteholders, Kent Cochran, Carl P. Dennett, and Claude Pearce, owners of Prior Preference and $4 Preferred Stock of Standard have joined in and supported said motion, arguments, briefs and memoranda.

12. The value of the equity of the stockholders of Standard in its assets have largely increased in value since the approval of the Amended Plan by the Commission on November 15, 1944, and since the entry by this Court on March 29, 1945 of the decree hereinbefore mentioned.

The conclusions of law of the Court are embodied in the following decree:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the petition of Christian A. Johnson, Al. P. Johnson and Jean Johnson, individually and also for the benefit of all holders of $7 Prior Preference Stock, of $6 Prior Preference Stock and of $4 Preferred Stock of Standard is granted and they are permitted to become formal parties to this proceeding. The petition of intervention of Vallerie Lathrope Dauphinot to intervene and become a formal party to this proceeding is likewise granted.

2. Standard has the right to make a call for redemption of the Notes outstanding in accordance with the provisions of the indentures pursuant to which the Notes were issued, provided Standard files appropriate applications or declarations with the Commission and takes such other steps as are necessary to make a call.

3. Standard's method of calling its Notes for redemption in accordance with the various indentures under which said Notes were issued or its arrangement for calling the same shall be with the approval of the Commission.

4. This proceeding is remanded to the Commission for further proceedings not inconsistent herewith.

5. When, if and after the call of the Notes has been effectuated, the Commission may fix a date for hearings and receive evidence in order to determine whether any modification should be made in the provisions of the plan respecting the treatment of the various classes of stock of Standard and to make such findings as it deems proper to this court in the event that Standard requests the Commission to apply to this Court for further enforcement of the plan.

6. In the event that no call of the Notes is made within thirty days from the date hereof or within such further time as the SEC may grant, the Commission may apply to reinstate its original petition, praying for such further orders, judgments and decrees as it may deem meet.

Dated: December 29, 1945

/s/ PAUL LEAHY,
J.

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CITATIONS

685366—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 831

GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, TRUSTEES OF UNION COLLEGE IN THE TOWN OF SCHENECTADY, STATE OF NEW YORK, FRANK BAILEY, MARIE LOUISE BAILEY, MARIE LOUISE BAILEY AND FRANK BAILEY AS TRUSTEES, JOHN VANNECK AND PAUL C. MORAN AS TRUSTEES AND EQUITABLE HOLDING CORPORATION, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

No. 832

SAME

v.

STANDARD GAS AND ELECTRIC COMPANY AND SECURITIES AND EXCHANGE COMMISSION

No. 833

SAME

v.

STANDARD GAS AND ELECTRIC COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings and opinions of the Commission (R. 3–125), not yet officially reported, are set forth in the Commission's Holding Company Act releases Nos. 5070 and 5430. The opinion of the District Court (R. 129–143) is reported at 59 F. Supp. 274. The opinion of the Circuit Court of Appeals (R. 203–215) is reported at 151 F. 2d 326.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on September 14, 1945 (R. 215–217). By orders entered herein the time within which petitions for writs of certiorari might be filed was extended to February 11, 1946 (R. 221–222). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 11 (e) of the Public Utility Holding Company Act of 1935 permit a plan satisfying creditors' claims in equity securities of substantially equal value rather than in cash?

2. For the purposes of such a plan, may the claim upon outstanding holding company notes and debentures properly be determined as their face value and accrued interest, exclusive of the

amount of voluntary call premiums applicable thereto?

3. If the foregoing questions are answered in the affirmative, is Section 11 (e) unconstitutional as a taking of property without due process of law in violation of the Fifth Amendment or as an unwarranted exercise of the commerce power?

STATUTE INVOLVED

The applicable provisions of the Public Utility Holding Company Act of 1935 (hereinafter called the Act) are set forth in the Appendix, *infra*, p. 24, *et seq.*

STATEMENT

The order of the Circuit Court of Appeals sought to be reviewed reversed an order of the District Court refusing to enforce a plan of reorganization of Standard Gas and Electric Company ("Standard"), previously approved by the Commission, under Section 11 (e) of the Act. The plan provided *inter alia* for the elimination of Standard's notes and debentures through satisfaction thereof partly by cash and partly by shares of common stock in Standard's investment portfolio.

Standard is a public utility holding company registered as such under the Act (R. 29). It is a subsidiary of Standard Power & Light Company, also a registered holding company (R. 7, 105). Standard has numerous direct and indirect subsidiaries operating throughout the United States (see

chart, R. 117–120). Its principal subsidiaries consist of four operating companies and two registered holding companies, the latter having in turn many direct and indirect subsidiaries. The direct and indirect subsidiaries of Standard Gas have outstanding in the hands of the public mortgage bonds, unsecured indebtedness, and various classes and series of preferred stocks. Standard Gas itself has outstanding $59,000,000 of unsecured notes and debentures, two series of senior cumulative preferred stock, an issue of junior preferred stock, and common stock (R. 32, 92). Since 1934, no dividends have been paid on any of Standard's stocks (R. 6, 33). All of Standard's holdings are confined to common stock, some of which are of pyramided and intermediate holding companies and are characterized by substantial leverage.

To bring the sprawling Standard system within the requirements of Section 11 (b) (1), the Commission, prior to the submission of the plan involved in this proceeding, had entered an order directing Standard to divest itself of all its holdings except its interest in one specified subholding company.[1] The Commission has also found that Standard's system does not comply with Section 11 (b) (2) in that the distribution of Standard's voting power is grossly inequitable, Standard's structure is over-complicated, and

[1] *Standard Power & Light Corporation* and *Standard Gas & Electric Company*, 9 S. E. C. 862 (1941).

the Standard system violates the "great-grandfather" provision (the second sentence of Section 11 (b) (2)). The plan approved by the Commission herein was found by the Commission to be a step in compliance with its 11 (b) (1) order and also a step toward effectuating compliance with the provisions of Section 11 (b) (2) of the Act. (R. 90–93.) With specific reference to the notes and debentures, the Commission found that their elimination was required by Section 11 (b) (2) of the Act (R. 94).

The plan, which was approved by the Commission in November, 1944, would substitute a simple one-stock structure for the present complicated structure of Standard (R. 92). Standard's notes and debentures would be eliminated. These securities bear 6% interest and are due at varying dates between 1948 and 1966 (R. 32, 97). The plan provides that for each $1,000 of principal amount of Standard's notes and debentures there shall be paid $304.95 in cash[2] together with a specified number of shares of common stock of five operating companies (including Standard's four major operating company subsidiaries) in Standard's portfolio. These portfolio securities proposed to be distributed

[2] The cash required by the plan to be distributed to the debenture holders was to be provided in part out of Standard's treasury and in part out of three-year 3% bank loans (R. 37, 92).

were found by the Commission upon a detailed analysis of each security (R. 40–61) to have a value of approximately $690.[3]

The Commission found that the cash and portfolio securities provided in the plan were the fair equivalent of the claims of the debentures, and that the plan was fair and equitable to the holders of the debentures (R. 97).

Upon its approval of the plan, the Commission, at the request of Standard Gas, filed an application in the United States District Court for the District of Delaware for enforcement of the plan. In March 1945, after full hearing, the District Court, although accepting the Commission's valuation of the portfolio stocks, rejected the plan for the reason that it provides for satisfaction in portfolio stocks of a portion of the claims of the debentures. In all other respects the plan was found appropriate to effectuate Section 11 (b) and fair and equitable to the persons affected thereby (R. 129–150). The

[3] The stocks had been assigned in the plan a value of $690, subject to a provision that the value for the purposes of the plan would be raised or lowered in proportion to the average variation in the market prices of certain representative utility operating company stocks from August 15, 1944 to the date of the Commission's opinion (but not raised or lowered by more than 3%) (R. 35, 36). In fact the variation between those dates was only 7/10 of 1%, raising the value of of the stocks for purposes of the plan from $690 to $695.05, and reducing the cash provided in the plan from $310 to $304.95.

Circuit Court of Appeals for the Third Circuit reversed the order of the District Court in September, 1945, holding that the satisfaction of the notes and debentures in part by portfolio stocks was proper.

Petitioners, in referring to the proceedings subsequent to the mandate of the Circuit Court of Appeals, state that "It may be argued by the Commission * * * that this petition is moot" (Pet. 8). We do not take that position. We believe, however, that the proceedings subsequent to the mandate illustrate the difficulties created by drawn-out processes of litigation in the effectuation of a Section 11 (e) plan[4] and, as such, may be relevant to this Court's determination whether the writ of certiorari should be granted.

[4] For this reason the Commission opposed extension of the time to file a petition for a writ of certiorari herein.

Standard first filed an application for approval of a plan under Section 11(e) of the Act in March, 1943. Public hearings were held thereon for 32 days in the course of which a voluminous record was made, exploring in detail the assets and earning power of the companies in Standard's system. After briefs had been filed and oral arguments had been held, the Commission issued its findings and opinion in May, 1944, pointing out that the plan could not be approved and giving Standard time to file an amendment to accord with the views of the Commission expressed therein. (R. 3–17.) The present plan was filed in August, 1944 (with amendments filed in September and November, 1944) and public hearings were held thereon. (R. 29.) In November, 1944, the Commission approved the plan and filed a petition for its enforcement in the District Court. (R. 1, 126–128.)

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Most of these events are described in *In re Standard Gas and Electric Company* (D. Del.), Dec. 29, 1945, as follows:

> Since the receipt of the mandate, a Noteholder and owners of preferred and preference stocks have sought to intervene. The Noteholders, seeking the entry of the decree originally proposed, seek approval of the plan as fair and equitable and ask for enforcement. The stockholders contend that, since the original approval of the plan by the Securities and Exchange Commission in November, 1944, there has been a radical change of circumstances, i. e., the underlying stocks have greatly increased in value, and to permit the Noteholders to receive the package of stocks allotted to each of them, together with cash, would mean that each would receive substantially more than the face amount of his debt, plus premium plus interest.
>
> A hearing was held on the stockholders' request for intervention. Before this matter was adjudicated, Standard requested the Commission to withdraw its application to this court for an order enforcing the plan. Alleging changed circumstances, Standard then filed a motion to have the plan declared unfair and inequitable and sought an order dismissing the application of the SEC for enforcement of the plan. Standard, in its supporting papers, states that it has a definite program for the prompt redemption of its Notes.

The Commission took the position, contrary to the contentions of Standard, that there had not been such a material change in circumstances as to warrant a re-examination of prior holdings as to the fairness and appropriateness of the plan. But the Commission also concluded that the proceedings on the plan had not progressed to the point where creditors' rights had been transmuted into a right to receive the cash and new securities called for by the plan, and that, accordingly, Standard remained free to discharge the creditors' claims in accordance with pre-existing contract rights and without availing itself of the reorganization provisions of the Act. The District Court accepted this latter recommendation of the Commission and remanded the case to the Commission so that Standard might be accorded the opportunity to effectuate the financial arrangements which might be necessary to call and retire the notes and debentures. The District Court has not found it necessary to decide whether by reason of alleged change of circumstances the plan should be held no longer "fair and equitable."

An appeal has been taken by certain debenture holders from the decree of the District Court remanding the case to the Commission. Upon application of Standard, the Commission has authorized Standard to issue $51,000,000 principal amount of 2½% bank loan notes to be used, together with treasury cash, for the call and retire-

ment of the notes and debentures. See *Standard Gas and Electric Company,* Holding Company Act Release No. 6435 (1946).

ARGUMENT

The questions presented arise out of a program for fulfillment of the requirements of Section 11 (b) of the Act by Standard. These and allied questions are recurring and therefore in that sense are important in the administration of the Act. But, it is submitted, there can be no serious doubt of the correctness of the decision of the court below upon the issues involved nor is there any conflict of decisions on these issues among the circuit courts of appeals. Under these circumstances there is no occasion for review by this Court.

1. *Power of the Commission to approve a plan providing for satisfaction of holding company notes and debentures by securities of underlying operating companies.*—Bringing about compliance with the standards of Section 11 (b) by existing holding company systems presents varying and complex problems, and Congress left to the Commission the determination of what "action" or "steps" should be taken in each situation. In the instant case the elimination of Standard Gas' notes and debentures is one such step found necessary by the Commission, and petitioners do not quarrel with this determination. Petitioners contend, however, that the notes and debentures

can be eliminated only by payment in cash according to the terms of their contract. The basis of petitioners' contention that the Commission has no power to authorize the satisfaction of their claims by securities of underlying operating companies in Standard Gas' portfolio is that Section 11 of the Act is not a true reorganization statute. The terms of Section 11 and its legislative history make clear the invalidity of petitioners' contention.

Under Section 11 (a) of the Act, the Commission makes an examination of each registered holding company system from the viewpoint of the effect on such system of the provisions of Section 11 (b). The Commission is directed to determine as soon as practicable what "action" or "steps" should be taken by each system to meet the standards of Section 11 (b). Failure to comply with a Section 11 (b) order results in recourse by the Commission to the courts under Section 11 (d). The district court is there given power to effect compliance by "disposition" of any or all of the assets of the company "in accordance with a fair and equitable *reorganization* plan which shall have been approved by the Commission * * *". (Italics supplied.) Similarly under Section 11 (e), every registered holding company is invited to file a fair and equitable "plan * * * for the divestment of control, securities, or other assets, or for other action * * *" to enable it to meet the standards

of Section 11 (b). Section 11 (f), which relates *inter alia* to court proceedings under Section 11 in case a trustee has been appointed as authorized in subsections 11 (d) and 11 (e), provides: "Notwithstanding any other provision of law" a "*reorganization* plan may be proposed" by the Commission or, subject to Commission rules, "by any person having a bona fide interest * * * in the *reorganization*" (italics supplied).

There can be no question that Congress deliberately used this reorganization terminology intending to create a reorganization statute. The Senate Committee on Interstate Commerce reported[8]

> Subsections (d), (e), and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under the supervision of the Federal courts. * * * Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, and the Commission and the court are authorized to approve any plan so worked out voluntarily by a holding company as the Commission and the court might order under their compulsory powers. * * *

That these plans of reorganization might provide for distribution of portfolio securities to existing

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[8] S. Rep. No. 621, 74th Cong., 1st sess., p. 33.

holding company security holders was also spelled out by the Senate Committee:[6]

> * * * the title does not require the dumping or forced liquidation of securities. Such disposition as may be necessary can be accomplished by reorganization which will equitably redistribute securities among existing security holders.

Where Congress in the public interest has authorized a reorganization, the contract rights of a security holder may not block enforcement of the "overriding public policy." Cf. *Otis & Co.* v. *Securities & Exchange Commission,* 323 U. S. 624, 637; and see *Continental Insurance Co.* v. *United States,* 259 U. S. 156.[7] The claims of security holders in a reorganization are satisfied

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[6] *Id.* at p. 16. Although the bill reported out by the Senate differs somewhat from the Act as ultimately passed, the latter, as demonstrated by the court below, enlarged rather than restricted the Commission's available remedies (R. 207).

For further legislative history clearly indicating that distribution of portfolio securities was intended see *id.* pp. 13, 32, 33, 34, 35; see footnote 8, *infra;* and see H. Rep. No. 1318, 74th Cong., 1st sess. pp. 49–50; and 79 Cong. Rec. 10361.

[7] This case was cited by Congressman Eicher in his Additional Views contained in the Report of the House Committee on Interstate and Foreign Commerce (H. Rep. No. 1318, 74th Cong., 1st sess., pp. 49–50) in reply to the "allegation that the Senate bill will cut off valuable equities by the forced liquidation of assets and the dumping of securities upon a demoralized market * * *" to show that under the anti-trust laws the contract rights of creditors may be altered.

if the security holders receive in order of their priority the "equitable equivalent of the rights surrendered". *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523, 565; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 529–30; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 482; *Kansas City Ry.* v. *Cent. Union Tr. Co.*, 271 U. S. 445, 455. This consideration applies with equal force to the contract rights of preferred stockholders and to those of creditors. *Otis & Co.* v. *Securities and Exchange Commission, supra*, at p. 634.

In bankruptcy reorganizations no distinction is made in the application of this rule to the claims of bondholders and those of stockholders. Similarly, there is no valid ground for a distinction in its application to the claims of different types of security holders in a reorganization under Section 11 of the Holding Company Act. Petitioner's argument that creditors' rights in a solvent corporation cannot be varied ignores the fact that the Act, like the anti-trust acts, under which creditors' rights in solvent corporations are varied (see note 7, *supra*), is an exercise of the commerce power and not of the bankruptcy power of Congress. Nothing in Section 11 or its legislative history indicates any basis for the claimed distinction between the right of debt security

holders to observance of the terms of their contracts (see Pet. Br. p. 11) and the rights of other classes of security holders. Indeed, the studies which formed the basis for the Act made clear that holding company debt securities are often "only common stocks in disguise."[8] As the court below pointed out, Standard's debentures and preferred stocks are all based upon the common stocks of underlying operating companies. "This identity of origin renders caste distinctions of little significance here." (R. 209.)

2. *Fairness of the Plan.*—The Commission found that the securities and cash to be distributed to the holders of Standard's notes and debentures had a value equivalent to their claim.[9] Both courts below agreed with this finding.[10] In-

[8] Utility Corporations, S. Doc. No. 92, 70th Cong., 1st sess., Part 72–A, p. 154. See also id. at 357–358, and Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st sess., p. 212.

[9] In fact, the portfolio securities were found to have a value sufficiently higher than the portion of debentures not satisfied by cash to compensate debenture holders in full, having in mind the fact that the debenture holder "will incur some expense if he wishes to convert his package of securities into cash and that any loading in value that the package may contain * * * may well be lost through the expense of converting the bundle into cash." (R. 96.)

[10] Although the District Court held that no plan could be fair which attempted to discharge the debenture claim by an allocation of assets, it agreed that if this were possible the amount of assets tendered by this plan is equal in value to the debenture holder's claim.

deed, petitioners do not complain that a fair valuation of the securities they are to receive plus the cash payment proposed under the plan is not equal to the face amount of their debentures plus interest. Their theory is that the plan is unfair in that it fails to compensate them for their alleged loss of senior position.[11]

Concededly, the rights of senior security holders are not satisfied in full merely because they receive junior securities of a "face amount" equivalent to their claims. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523. However, as this Court pointed out in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 529, "whether in case of a solvent company the creditors should be made whole for the change in or loss of their seniority by an increased participation in assets, in earnings or in control, or in any combination thereof, will be dependent on the facts and requirements of each case."

In determining the value of the securities to be received in exchange for the bundle of rights given up, the Commission compared not only factors relating to the safety of the investment, but also such factors as the amount of income

[11] Petitioners also claim the plan is unfair in failing to include in their claim the call premium provided in the event of voluntary retirement of the debentures. This objection is discussed below.

that may be allocable to the securities to be exchanged. The record makes clear that under the plan petitioners will give up little of substance from the standpoint of the safety of their investment, and they will be in a position where they they might receive substantially enhanced earnings. Standard's notes and debentures are not gilt-edged investments. They are speculative securities, since all income applicable to them stems from the earnings of common stocks of the underlying operating companies in the system. The operating companies' common stocks which are to be used in part satisfaction of these debentures are, as the court below noted, "the cream off the milk in the Standard ice box". (R. 213).[12] The Commission found that the package of common stock to be received by each $1,000 note and debenture holder was "paying in the aggregate about $44 in dividends annually", was "currently earning approximately $59" and had "estimated future earnings of about $70" (R. 94). This must be contrasted with the 6% limitation upon the earnings of the notes and debentures, which amounts to less than $42 on the portion thereof not satisfied by cash.

[12] The percentage of gross income available for all stocks owned by Standard averages only 30%, whereas the weighted average percentage of gross income available for the common stocks proposed to be substituted for the notes and debentures is 35% (R. 43, 48, 53, 56, 60, 95).

Standard's notes and debentures are subject to the same kind of risk of declining earnings as are the common stocks to be received in exchange therefor. Whatever difference there may be in the degree of such risk is adequately counterbalanced by the greater quantum of present and prospective earnings applicable to these common stocks.

3. *The Call Premium.*—Petitioners contend that the extent of their compensation must include the amount of premium payable in the event their securities should voluntarily be called by Standard. The holdings of both courts below are contrary to this contention, and all other courts which have had occasion to consider the problem have uniformly held that a retirement of senior securities compelled by Section 11 does not call into play such voluntary redemption provisions as are here involved.[18] The Commission did not find that the investment quality of the notes and debentures entitled their holders to receive more than their face amount plus interest

[18] The circuit court decisions are: *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2), certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781; *City National Bank and Trust Co.* v. *Securities and Exchange Commission*, 134 F. 2d 65 (C. C. A. 7); and *Massachusetts Mutual Life Insurance Co.* v. *Securities and Exchange Commission*, 151 F. 2d 424 (C. C. A. 8), petition for certiorari pending, No. 802, this Term.

(see R. 93–97), and petitioners do not contend that a finding to that effect should have been made.[14]

In the instant case the redemption of the debentures is necessary because the debentures constitute an undue and unnecessary complexity in the Standard Gas system, and because the debentures are a cause of the inequitable distribution of voting power. It does not result from any election by the company to avail itself of the indenture provision under which it may prepay at a premium. In view of the Commission's findings as to the quality of the notes and debentures, the fair and equitable standard is satisfied by payment of face amount now, as, under the circumstances, the equitable equivalent of future payment of interest and principal on the contract dates. See *Otis & Company* v. *Securities and Exchange Commission,* 323 U. S. 624, 638, in which the Court recognized the consistency of the result reached in that case with lower court decisions which had upheld similar prepayments of debt claims at their face amounts.

4. *Necessity and Appropriateness of the Plan.*— Petitioners' only basis for their contention that the plan is not necessary or appropriate is that a plan providing for payment of the claims of noteholders and debenture holders in cash might have been feasible.

[14] In that respect the case differs from *American Power & Light Company*, Holding Company Act Release No. 6176, discussed in our brief in opposition in *Massachusetts Mutual Life Ins. Co.* v. *Securities & Exchange Commission*, No. 802, this Term.

The fact that alternative plans might have been approved obviously cannot render this plan an unnecessary step toward compliance with Section 11 (b) since in that event no plan could ever be "necessary". The complex process of bringing the many holding company systems into conformity with Section 11 (b) has necessarily extended over a substantial period during which extrinsic circumstances, including the condition of the securities markets, have not remained static. It was clearly the intention of Congress that the Commission, as an administrative body specializing in the financial field, should exercise a large discretion in dealing with the practical problems presented by the particular needs of each holding company system in the financial setting prevailing at the time that task is undertaken.

Various considerations were involved in the Commission's determination to accept a plan settling the claims of Standard's security holders in kind rather than in cash. As we have seen, Standard's note and debenture holders have no present right to cash. There were involved such questions as the added expense to the security holders of an underwriting and of registration of the securities which would have to be sold in order to raise cash. Moreover, questions of public interest, such as the effect of the plan on the securities markets, were involved. As the court below pointed out (R. 212):

> * * * the wide grant of power given by Congress to the Commission carries with it the authority to the Commission to fix the form of reorganizations, subject to court control if the Commission departs from the law. We do not think that the district court or appellate court is to substitute its notion of practical expediency for that of the Commission.

5. *Constitutional Problems.*—As we understand petitioners' contentions as to constitutionality, they are (a) that the plan is so inequitable as to violate constitutional rights and (b) that modification of creditors' rights is beyond the reach of Congress under the commerce clause.

Petitioners apparently would not urge the first objection in opposition to what they considered a "fair and equitable plan". Hence the objection does not extend to "the constitutional validity of the section in its general scope and application".[15] *Continental Ill. N. B. & T. Co.* v. *C. R. I. & P. Ry Co.,* 294 U. S. 648, 667. If the plan is unfair it fails for contravention of the statutory standard; if fair, the alleged constitutional difficulty disappears.

[15] Such problems are currently before this Court in other cases. *North American Company* v. *Securities and Exchange Commission*, October Term, 1945, No. 1; *Securities and Exchange Commission* v. *Engineers Public Service Company* etc., October Term, 1945, Nos. 2 and 3; and *American Power and Light Company* v. *Securities and Exchange Commission*, etc., October Term, 1945, Nos. 6 and 7.

No valid reason is suggested in support of petitioners' second objection why the powers of Congress under the commerce clause should be less pervasive than under the bankruptcy clause.[16] In any event, as we have pointed out above, this Court has held in the cases under the anti-trust acts that creditors' rights may be varied in compliance with the public policy expressed in statutes based on the commerce power. See, *supra*, p. 13; *Otis & Co.* v. *Securities & Exchange Commission,* 323 U. S. 624, 634 n. 14. At least equal reasons exist for the exercise of a similar power in Public Utility Holding Act cases. The circumstances which may validly call for modification of creditors' rights are not limited by the Constitution to insolvency of the debtor.

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[16] Petitioners' reference to the "essential safeguards" in bankruptcy reorganization legislation, "such as the requirements of a right to a hearing and the vote of creditors of a class affected" (Pet. Br. p. 18), is irrelevant. Under Section 11 (e) the Commission can approve a plan only "after notice and opportunity for hearing", and petitioner here, in accordance with the Commission's Rules of Practice were accorded a hearing. So far as security holders' votes are concerned, Congress obviously did not wish to give any class of security holders the power to veto compliance with Section 11, and for this reason it followed the equity precedents under the anti-trust laws rather than precedents in bankruptcy reorganization statutes. It should be noted that the bankruptcy reorganization statutes themselves have provision whereby a vote may be dispensed with under certain circumstances. See the third paragraph of Section 77 (e) of the Bankruptcy Act (11 U. S. C. 205 (e)); and see Chapter X, subsections 216 (7) and (8) of that Act (11 U. S. C. 516 (7) and (8)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

ROGER S. FOSTER,
Solicitor,

MORTON E. YOHALEM,
Counsel, Public Utilities Division,

DAVID K. KADANE,
Special Counsel,

DAVID L. FERBER,
Attorney, Securities and Exchange Commission.

MARCH 1946.

APPENDIX

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a *et seq.*:

SECTION 1.

* * * * *

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon

the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective pub-

lic regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

* * * * *

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and

equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of

localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this

paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * *

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and

equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for

hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after

opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

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U. S. GOVERNMENT PRINTING OFFICE: 1940

No. 831 - 833

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, TRUSTEES OF UNION COLLEGE IN THE TOWN OF SCHENECTADY, STATE OF NEW YORK, FRANK BAILEY, MARIE LOUISE BAILEY, MARIE LOUISE BAILEY AND FRANK BAILEY AS TRUSTEES, JOHN VANNECK AND PAUL C. MORAN AS TRUSTEES AND EQUITABLE HOLDING CORPORATION

Petitioners

v.

STANDARD GAS AND ELECTRIC COMPANY
(And Other Cases as Shown on Page 1)

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, STANDARD GAS AND ELECTRIC COMPANY, IN OPPOSITION

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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IN THE

Supreme Court of the United States

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GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, TRUSTEES OF UNION COLLEGE IN THE TOWN OF SCHENECTADY, STATE OF NEW YORK, FRANK BAILEY, MARIE LOUISE BAILEY, MARIE LOUISE BAILEY AND FRANK BAILEY AS TRUSTEES, JOHN VANNECK AND PAUL C. MORAN AS TRUSTEES AND EQUITABLE HOLDING CORPORATION

Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION

Respondent

(Number 8885 below)

SAME

v.

STANDARD GAS AND ELECTRIC COMPANY AND SECURITIES AND EXCHANGE COMMISSION

Respondents

(Number 8906 below)

SAME

v.

STANDARD GAS AND ELECTRIC COMPANY

Respondent

(Number 8934 below)

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, STANDARD GAS AND ELECTRIC COMPANY, IN OPPOSITION

Opinions Below

The opinion of the Circuit Court of Appeals (R. 203) is reported in 151 F. 2d 326. The opinion of the District Court (R. 129a) is reported in 59 F. Supp. 274. The opinions of the Securities and Exchange Commission[1] are reported in Holding Company Act Release No. 5430 (R. 3a) and Holding Company Act Release No. 5070 (R. 29a).

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on September 14, 1945. The Petition for Writs of Certiorari was filed on February 11, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Section 347).

Questions Presented

1. Whether Respondent,[2] a solvent registered holding company, could provide in a Plan for Recapitalization,[3] pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935,[4] for the payment of its notes and debentures partly in cash and partly in stocks of other corporations, rather than entirely in cash.

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[1] Hereinafter referred to as "the Commission."
[2] Standard Gas and Electric Company, hereinafter referred to as "Respondent."
[3] Hereinafter referred to as "the Plan."
[4] Hereinafter referred to as "the Act" (15 U. S. C. 79).

2. Whether the Plan providing for the payment of notes and debentures in cash and in such stocks was fair and equitable.

3. Whether the Plan, which was filed in compliance with the mandatory provisions of the Act and which provides for immediate payment of notes and debentures not due by their terms until some years later, must provide for payment of the call premiums specified in the applicable trust indentures.

4. Whether Section 11 of the Act as construed by the Commission in the instant case is constitutional.

Statute Involved

The pertinent provisions of Section 11 of the Public Utility Holding Company Act of 1935 (15 U. S. C., Sec. 79k *et seq.*) are set forth in the annexed Appendix A.

Additional Statement

The Findings and Opinion of the Commission

The Commission found (R. 90a) that the Plan would go "a long way" in the direction of limiting the operations of Respondent to the Philadelphia Company system, and was necessary to effectuate the provisions of Section 11 (b)(1) and 11(b)(2). (R. 94a). It held the Plan to be fair and equitable in its treatment of note and debenture holders (R. 97a). The highest coverage by Respondent of its fixed charges between 1936 and 1944 on a corporate basis was 1.46 times (in 1943), and on a consolidated basis the highest coverage for those fixed charges and for prior charges of subsidiaries, was 1.25 times (for the twelve months ended June 30, 1944) (R. 95a). For the $695.05 principal amount of each $1000 note and debenture to be discharged under

the Plan through the distribution of Respondent's portfolio securities, the holders thereof would receive common stocks which were paying $43.30 in dividends annually, earned $59.03 in 1943 and had estimated future annual earnings of $69.63 (R. 93a). These figures are to be compared with the interest, $41.70, that would be due to the holders on the $695.05. The Commission considered the securities to be delivered to have a slightly higher market value than the aggregate basic value of $695.05 assigned under the Plan (R. 96a).

The Commission held that the holders of the debentures (the notes being callable, by their terms, without any premium) were not entitled to receive call premiums because their retirement was "plainly necessitated by Section 11" (R. 94a); that not only was Respondent required to divest itself of portfolio securities and contract its capital structure in order to conform with Section 11(b)(1), but it must simplify its corporate structure and bring about an equitable distribution of voting power required by Section 11(b)(2). (R. 94a).

Proceedings in the District Court

After the Circuit Court of Appeals for the Third Circuit reversed the judgment of the District Court for the District of Delaware and issued its mandate, the District Court, for the reasons stated in its opinion (Appendix B, p. 21), remanded the proceedings to the Commission and divested itself of jurisdiction, subject to the right of the Commission to make application for reinstatement of its original petition. The Order and Decree of that Court, dated December 29, 1945, contained the following findings of fact:

> "6. The value of the shares of stock to be delivered to the Noteholders[5] under the provisions of the

[5] The District Court referred to the notes and debentures as "the Notes."

Amended Plan has increased to such an extent since the Amended Plan was approved by the Commission on November 15, 1944, and since the entry by this Court on March 29, 1945, of a decree making certain Findings of Fact and Conclusions of Law relative to the Amended Plan, that it may require a re-examination of the Amended Plan to test whether it is fair and equitable to the persons affected thereby.

"7. Evidence submitted in the form of affidavits and offers of proof, in the form of admissions of counsel, and in the form of facts, of which the Court was requested to and did take judicial notice, indicates that the portion of the portfolio securities of Standard, proposed in the Plan to be distributed to the Noteholders in partial discharge of their claims, have a current actual and market value substantially in excess of that part of the claims of the Noteholders to be discharged thereby. Estimates of the amount of such excess vary between a minimum of $12,250,000.00 and a maximum of $30,000,000.00."

Respondent is presently doing everything possible to effect a program contemplating the orderly and expeditious retirement of all its outstanding notes and debentures. The time during which Respondent may call such notes and debentures was extended to March 20, 1946 by order of the Commission entered February 18, 1946. A group of banks has agreed to loan Respondent $51,000,000 to be used, with a part of its treasury cash, for the redemption of all of its outstanding notes and debentures, and on February 26, 1946, an order was entered by the Commission authorizing the issuance by Respondent of its 2½% secured promissory notes, in the aggregate principal amount of $51,000,000, to evidence the loan.

Reasons for Denying the Writs

Since the District Court has remanded the Plan to the Commission and has specifically upheld Respondent's right

to redeem its notes and debentures at par, plus the call premiums on the debentures provided in the applicable trust indentures, and since Respondent is presently proceeding with the arrangements contemplating the call for redemption, it might well be that all the questions presented in the petition are moot.

In the event the Court determines that the issues raised by Petitioners are not moot, Respondent submits that the petition should nevertheless be denied for the following reasons:

The language of Section 11 of the Act, and the opinion of this Court in *Otis & Company* v. *Securities & Exchange Commission,* 323 U. S. 624, leave no doubt that Section 11 is intended to authorize and direct the recapitalization of registered public utility holding companies to conform with the standards provided in the Act. Creditors' rights as well as all other contract rights may be revised in accordance with the principles of fairness and equity as defined by this Court. It is sufficient that they be given compensatory treatment and receive the equitable equivalent of their claims.

The Plan recognizes and satisfies in full the contract rights of note and debenture holders.

The Courts below which have passed on the issue agree that creditors are not entitled to call premiums, and the principles of law expressed in their opinions have been approved by this Court in the *Otis* case, *supra.*

Congress' right to regulate interstate commerce fully sustains the constitutionality of Section 11 in its instant application.

Argument

1. Section 11(e) of the Act authorizes the submission of plans by a registered holding company "for the divestment of control, securities or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of sub-section (b)". Section 11(b)(1) authorizes the Commission to "take such action as the Commission shall find necessary to limit the operations of the holding company system • • • to a single integrated public-utility system" and, subject to certain conditions and in the discretion of the Commission, one or more additional integrated public-utility systems. Section 11(b)(2) authorizes the Commission to require any registered holding company to "take such steps as the Commission shall find necessary to insure that the corporate structure or continuing existence of any company in the holding company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders."

The term "corporate structure" as employed in the Act has been interpreted and applied by the Courts as synonomous with "security structure" and as including outstanding debt.

> *In re Laclede Gas Light Co.* et al., 57 F. Supp. 997;
> *In re American Gas & Power Co.*, 55 F. Supp. 756;
> *In re Consolidated Electric & Gas Co.*, 55 F. Supp. 211;
>
> *Jacksonville Gas Company*, H. C. A. Release Nos. 3570 and 3572; approved 46 F. Supp. 852 (D. C. S. D. Fla.);
>
> *In re Community Power & Light Company*, 6 S. E. C. 182; approved 33 F. Supp. 901 (D. C. S. D. N. Y.).

It is no longer open to question that Section 11 authorizes the Commission to recapitalize registered holding com-

panies and to modify the contract rights of its security holders, including its creditors.

Otis & Co. v. *Securities and Exchange Commission*, 323 U. S. 624;

Commonwealth and Southern Corp. v. *Securities & Exchange Commission*, 134 F. 2d 747 (C. C. A. 3rd);

City National Bank & Trust Co. of Chicago v. *Securities & Exchange Commission*, 134 F. 2d 65 (C. C. A. 7th);

New York Trust Co. et al. v. *Securities & Exchange Commission*, 131 F. 2d 274 (C. C. A. 2d), cert. den. 318 U. S. 786;

In Re Jacksonville Gas Co. et al., 46 F. Supp. 852 (D. C. S. D. Fla.);

In re Community Power & Light Co., 33 F. Supp. 901 (D. C. S. D. N. Y.).

The Circuit Court of Appeals for the Third Circuit in approving (R. 203) the right of Respondent to satisfy the claims of note and debenture holders through the distribution of portfolio securities, reviewed the legislative history of Section 11 and demonstrated that it was the intention of Congress to authorize the Commission to direct corporate recapitalization when it deemed such recapitalization necessary to carry out the requirements of integration and simplification provided in the Act, and the satisfaction of creditors' claims through the issuance of other securities.

The Act suggests no distinction between creditors' rights and the rights of other classes of security holders; nor is there anything inherent in the character of a note or debenture so that it can successfully be maintained that the contract of a note or debenture holder is so different from

the contract of a preferred stockholder that the rights of a preferred stockholder may be varied, but those of a creditor must remain inviolate.

The alleged ability of Respondent to pay its debts in cash would not necessitate such payment. The Act provides that the Court must approve a plan if it finds that the plan is "fair and equitable" and "appropriate to effectuate the provisions of this Section" [Section 11(e)]. The Court is not required to make a finding of necessity in the sense suggested by Petitioners, or in any other sense. The question of the type of plan most appropriate to carry out the provisions of Section 11(b) is a matter for the Commission and not for the Courts. Whether or not Respondent could or should have sold the securities to be distributed to note and debenture holders was a question of fact to be determined by the Commission.

> *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Co.*, 318 U. S. 523, 544;
>
> *New York Trust Co.* v. *Securities & Exchange Commission*, 131 F. 2d 274, 275 (C. C. A. 2d), cert. den. 318 U. S. 786.

The word "necessary" as employed in Section 11(e) does not mean that the Plan must be the sole means of effectuating the purposes of Section 11(b).

> *In re Jacksonville Gas Company* (1942), H. C. A. Release Nos. 3570 and 3572; approved 46 F. Supp. 852 (D. C. S. D. Fla.);
>
> *Columbia Oil & Gas Corporation* (1942), H. C. A. Release No. 3885; affirmed *sub nom.* L. J. Marquis & Co. et al. v. Securities and Exchange Commission, 134 F. 2d 822 (C. C. A. 3rd);

In Re The United Light and Power Co. (1943) H. C. A. Release No. 4215; approved 51 F. Supp. 217 (D. C. D. Del.); affirmed *sub nom.* In re Securities and Exchange Commission, 142 F. 2d 411 (C. C. A. 3rd); affirmed, *sub nom.* Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624.

As was said by this Court in *McCullough* v. *Maryland*, 4 Wheat. 316, 413-414 (1819):

> "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."

The distribution of common stocks under Respondent's Plan conformed with

(a) The policy expressed in the Act of simplifying the holding company system of Respondent, and eliminating from that system properties deemed by the Commission unsuitable for retention;

(b) The order entered by the Commission under the mandatory provisions of the Act requiring the disposal by Respondent of all securities of corporations owned by it other than those of Philadelphia Company and Public Utility Engineering and Service Corporation; and

(c) The simplification of the corporate structure of Respondent through (a) the elimination of six issues of notes and debentures with varying terms, (b) the elimination of its four classes or series of stock with almost one-half the voting power with respect to directors lodged in a class of stock held by the Commission to be without value, and (c)

the creation of a simple corporate structure of one short term loan and one class of stock.

2. The action of the Commission in approving the Plan as fair and equitable, and necessary and appropriate to effectuate the provisions of Subsection (b) of Section 11 of the Act, is forcibly attacked by Petitioners. But their position is neither tenable nor formidable when considered in the light of the decisions interpreting the pertinent sections of the Act.

The Courts have held that the statutory standard "fair and equitable," whether in reorganizations, in bankruptcy, or in compliance with regulatory statutes, means that each class of security holders must receive compensatory treatment before payment to any junior class. They have also stated that this rule does not mean security holders must retain their priorities or receive cash. It is sufficient that they receive the "equitable equivalent" of their holdings. The "equitable equivalent" of a security may be other securities of a different character provided compensation is afforded for loss of rights. *Kansas City Terminal R. Co., et al.*, v. *Central Union Trust Co. of N. Y.*, 271 U. S. 445; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510; *Ecker, et al.*, v. *Western Pacific Railroad Corporation*, 318 U. S. 448; *Group of Institutional Investors and Mutual Savings Bank Group* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co., et al.*, 318 U. S. 523.

The Commission and the Circuit Court of Appeals found that the cash and portfolio securities to be distributed under the Plan to owners of notes and debentures were the "equitable equivalents" of the rights surrendered, and consequently fell squarely within the rules enunciated above. It is fundamental law that the findings of the Commission

will not be disturbed in the absence of an abuse of its powers.[6]

This Court has recognized that a mathematical calculation need not be made to determine the precise value of priorities and contract rights. The standard applied is the broad ideal of ethical business treatment. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80; *Group of Institutional Investors and Mutual Savings Bank Group* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co., et al.*, 318 U. S. 523. The flexibility of the rule is manifest from the following statement by this Court in *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624:

> "The allocation properly may be made without dollar valuation so long as 'each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered'."

3. (a) The claim of Petitioners that call premiums should be paid on the debentures if the Plan is effectuated is contrary to the authorities on this point. The Commission, the District Court and the Circuit Court of Appeals have disagreed with this contention. It is respectfully submitted that the correct rule of law is that the retirement of debentures pursuant to a Plan of a solvent public utility holding company under the Act is not a "voluntary calling" by the issuing corporation so as to entitle the holders of said securities to the call premiums specified in

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[6] *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 224, certiorari denied, 318 U. S. 786; *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80; *Group of Institutional Investors and Mutual Savings Bank Group, Petitioners*, v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co., et al.*, 318 U. S. 523.

their contracts between that corporation and its security holders. *New York Trust Co.* v. *Securities and Exchange Commission,* 131 F. 2d 274 (C. C. A. 2), cert. den. 318 U. S. 786, rehearing denied 319 U. S. 781; *City National Bank and Trust Co.* v. *Securities and Exchange Commission,* 134 F. 2d 65 (C. C. A. 7); *In re Laclede Gas Light Co.,* 57 F. Supp. 997, (D. C. E. D. Mo.); *In re Consolidated Electric and Gas Co.,* 55 F. Supp. 211 (D. C. D. Del.). It is significant that Petitioners have cited no authority in support of their position.

(b) It is well settled that it is not necessary that a Plan under the Act provide for the payment of additional compensation to the owners of notes and debentures which are being satisfied or discharged under said Plan for the discontinuance of interest payments on said securities so long as said owners receive the "equitable equivalent" of the rights they surrender. *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624; *Group of Institutional Investors and Mutual Savings Bank Group* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co., et al.,* 318 U. S. 523.

4. The Plan compensates note and debenture holders for their claims in their entirety. Voluminous testimony was taken before the Commission and findings of fairness and equity were made in accordance with the standards laid down by this Court. It cannot therefore seriously be maintained that an "appraisal method" was employed to evaluate creditors' rights, nor can it be suggested that valuable property rights were destroyed without just compensation. The provision of the Fifth Amendment of the Federal Constitution that property shall not be taken for public use without just compensation applies only to direct appropriations. Legal tender cases, *Knox* v. *Lee* (*Parker* v. *Davis*), 12 Wall. 457, 551; *Henderson* v. *Bryan,*

46 F. Supp. 682, 685 (D. C. S. D. Cal.); *In Re Community Power & Light Co.*, 33 F. Supp. 901 (D. C. S. D. N. Y.).

The right of Congress in regulating interstate commerce to require the equitable adjustment of creditors' rights so long as they receive full compensatory treatment is no longer open to question.

> *Group of Institutional Investors* v. *Chicago M. & St. P. R. Co.*, 318 U. S. 523;
>
> *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510;
>
> *Continental Ill. N. B. & T. Co.* v. *Chicago R. I. & P. R. Co.*, 294 U. S. 648;
>
> *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253;
>
> *Kansas City Terminal R. Co.* v. *Central Union Trust Co.*, 271 U. S. 445;
>
> *Continental Insurance Co.* v. *United States*, 259 U. S. 156.

In *Continental Ill. Nat. Bank & Trust Co.* v. *Chicago Rock Island & P. R. Co.*, 294 U. S. 648, 680, this Court stated:

> "Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts."

The power to vary creditors' claims in the course of regulating interstate commerce was specifically upheld in

Continental Insurance Company v. *United States,* 259 U. S. 156, 171:

> "The power of the court under the Sherman Anti-trust Law to disregard the letter and legal effect of the bonds and general mortgage under the circumstances of this case, in order to achieve the purpose of the law, we cannot question. The principles laid down and followed in the case of *United States* v. *Southern P. Co.* decided today [259 U. S. 214, post, 907, 42 Sup. Ct. Rep. 496], leave no doubt upon this point. Indeed, the case which we there cite, *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603, 613, 614, 56 L. ed. 911, 916, 917, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892, is a stronger instance of the power of Congress, in regulating interstate commerce, to disregard contracts, than is needed in this case, because there it was enforced as to a contract made before the regulation."

Conclusion

All of the questions involved, as presented by Petitioners, have been decided by this Court. They present no new or novel departure from settled law, and we respectfully submit that the petition for writs of certiorari should be denied.

A. Louis Flynn,
J. R. Clerkin,
231 South La Salle Street, Chicago
Attorneys for Standard Gas and Electric Company.

Abner Goldstone,
420 Lexington Avenue, New York,

Jacob K. Javits,
Emanuel Becker,
165 Broadway, New York,
Of Counsel.

February 28, 1946.

Appendix A.

Pertinent Provisions of the Holding Company Act of 1935.

SEC. 11 (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the

Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorgani-

zation plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or

administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

Appendix B.

The Opinion and Order of the District Court of December 29, 1945.

LEAHY, District Judge.

The plan of Standard Gas & Electric Company under Sections 11 and 18 (f) of the Public Utility Holding Company Act was here before and rejected. 59 F. Supp. 274. On appeal the Circuit Court reversed. 151 F. 2d 326. Since the receipt of the mandate, a Noteholder and owners of preferred and preference stocks have sought to intervene. The Noteholders, seeking the entry of the decree originally proposed, seek approval of the plan as fair and equitable and ask for enforcement. The stockholders contend that, since the original approval of the plan by the Securities and Exchange Commission in November, 1944, there has been a radical change of circumstances, i. e., the underlying stocks have greatly increased in value, and to permit the Noteholders to receive the package of stocks allotted to each of them, together with cash, would mean that each would receive substantially more than the face amount of his debt, plus premium plus interest.

A hearing was held on the stockholders' request for intervention. Before this matter was adjudicated, Standard requested the Commission to withdraw its application to this court for an order enforcing the plan. Alleging changed circumstances, Standard then filed a motion to have the plan declared unfair and inequitable and sought an order dismissing the application of the SEC for enforcement of the plan. Standard, in its supporting papers, states that it has a definite program for the prompt redemption of its Notes. At the hearing the SEC took the position that the particular part of the plan which affected Noteholders could be amended or changed *pro tanto*—i. e., Standard has the right to abandon its provision of payment to Noteholders by stocks and cash because until an order of approval of the original plan has been entered Standard has the right to call the Notes and redeem under the particular contract provisions of the indentures under which they were issued. The Trustee

under the indentures for the Noteholders stated its willingness to be paid off under the terms of the indentures. Other Noteholders took no position. Others took the position they had a "vested" right to receive the package of securities and cash called for under the plan because Standard has no legal right while its plan was pending to redeem its Notes; and one Noteholder argued that as she had purchased Notes at $1080 of their face amount in reliance upon her interpretation of the Circuit Court's opinion reversing the original holding here she was entitled to the original allocation of stocks and cash under the plan.

All parties have submitted forms of decree. One group of Noteholders asks for the entry of the decree first submitted and argues it should be followed in accordance with the mandate of the Circuit Court. The SEC suggests that Standard be given a period of 30 days to make a call for redemption in accordance with the provisions of the indentures and to file such applications or declarations with the Commission; and if the Notes are called the plan should be remanded to the Commission to hold hearings and receive evidence in order to determine whether any modification should be made in the plan for the treatment of the various classes of stock. If the Notes are not redeemed, then the SEC asks that an order be entered not inconsistent with the mandate of the Circuit Court. Standard seeks a decree holding the plan unfair and asks that the original petition of the Commission filed at Standard's request be dismissed. The intervenors on behalf of the preference and preferred stocks joined in Standard's prayers.

At the hearings which have been had since the Circuit Court filed its mandate last September, evidence has been submitted by affidavits, admissions and in the form of facts, of which I could take judicial notice, indicating that the portfolio securities of Standard, proposed under the plan to go to Noteholders, together with cash, have a current actual market value much in excess of the claims of the Noteholders. Estimates of such excess amounts started at $12,250,000 and stopped at $30,000,000. On the

basis of this prima facie showing the value of the shares of stock to be delivered to the Noteholders has increased to such an extent since the plan was approved by the SEC that it may be the plan should be re-examined to test whether it is fair and equitable to all the persons affected thereby. It follows that the value of the equity of Standard's stockholders has likewise increased in value since the matter was originally before the SEC, this court and the Circuit Court.

Since no final decree has ever been entered approving the plan Standard may call its Notes, but only under the supervision of the SEC. Since there can be more than one fair and equitable plan which complies with the requirements of the Act,[1] it is obvious that Standard may in the court of enforcement amend its plan, especially where the SEC approves. It is unnecessary to consider whether *Chenery* v. *SEC,* 318 U. S. 80, and *Jones* v. *SEC,* 298 U. S. 1, permit Standard by analogy to withdraw its plan completely and at will at this stage of the proceeding, or whether Standard would have such inherent power under the Act, because here we are concerned only with the power to call the Notes and the Commission concedes that Standard has such power.

However, I am not passing upon the method or provisions of a sufficient or satisfactory call. Since these matters are initially determined by the SEC in the usual case, I thing the Commission should in this case supervise the method of the call as distinguished from the right to make it.

Numerous arguments were heard and briefs have been filed urging that the amended plan is now unfair because there has been a radical change of circumstances. Although there have been numerous offers of proof there has never been a full hearing relative to this contention. This contention, accordingly, is left undecided and the parties will have an opportunity to show that there has been such a radical change of circumstances that the decree enforcing the plan ought not to be entered if Standard for any reason fails

[1] *In re North Continent Utilities Corporation,* D. C. Del., 54 F. Supp. 527 at 530.

effectively to consummate the call. Most of the parties admit and it does not seem to be the subject of serious doubt that a court of equity after the receipt of a mandate may consider a radical change of circumstances which has occurred prior to the time of entering its decree.[2]

My conclusion is that Standard is authorized to make a call for redemption of the Notes outstanding in accordance with the provisions of the indentures pursuant to which the Notes were issued, provided Standard files appropriate applications with the SEC; and such redemption should be under the supervision of the Commission. Accordingly, this proceeding will be remanded to the Commission for further proceedings not inconsistent herewith. After the call of the Notes has been effectuated the Commission may fix a date for hearing and receive evidence, if such is considers necessary, in order to determine whether any modification should be made in the plan respecting the treatment of the various classes of stock of Standard. The SEC may make such findings as it deems proper to this court; or, it may or may not be that Standard will request the Commission to apply to this court for further enforcement of the plan. If, however, no call of the Notes is made within 30 days from the date of the entry of the decree herein, or within such further time as may be granted by the Commission, then the SEC may apply to this court to reinstate its original petition praying for such further orders or judgment as it may deem meet.

Before arriving at the conclusions above stated and before the entry of the order filed today, I gave serious consideration as to whether I was not following the mandate of the Circuit Court received here on October 3, 1945. That mandate instructed that further proceedings should be had not inconsistent with the Circuit Court's opinion, 151 F. 2d 326. I am unable to detect in any one

[2] All but one of the parties in interest by admitting there may be radical and fundamental changed circumstances justifying a different plan admit the verity of the general proposition that there may be more than one fair and equitable plan.

instance how the further proceedings which I have directed should be taken could be in defiance of the mandate.

The order on the various motions entered this day provides that the intervenors may be made parties to this proceeding.

Dated: December 29, 1945.

ORDER

This Court having on March 2, 1945, filed its opinion, and on March 29, 1945, its decree, refusing to enforce a Plan under Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935, proposed by Standard Gas & Electric Company, and approved on November 15, 1944 by the Securities and Exchange Commission; and appeals from said decree having been taken to the Circuit Court of Appeals of the United States by the Commission and by Standard, and cross-appeals having been taken by representatives of certain holders of Notes and Debentures (hereinafter referred to as "Noteholders"); and said Circuit Court of Appeals having on September 14, 1945, filed its opinion finding that Noteholders could under the provisions of the Public Utility Holding Company Act of 1935 be required to accept portfolio securities of a holding company having a value equal to not less than the amount of their claims, and that a reorganization plan may be "fair and equitable" within the meaning of Section 11(e) of said Act which requires Noteholders to accept such securities in discharge of their claims; and said Circuit Court of Appeals having dated its mandate to this Court on September 14, 1945, which was later issued to this Court on October 2, 1945, reversing the judgment of this Court and remanding this cause to this Court for further proceedings not inconsistent with the opinion of said Circuit Court, and commanding this Court that "such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding"; and

Upon such remand to this Court, Christian A. Johnson, Al. P. Johnson and Jean Johnson, owners of Prior Preference and $4 preferred Stocks of Standard, having made a motion to intervene individually and also for the benefit of all owners of the $7 Prior Preference Stock, the $6 Prior Preference Stock and the $4 Preferred Stock of Standard, for the purpose of filing a pleading requesting in substance (1) that a supplemental hearing be had to receive proof of the unfairness of the plan by reason of drastically changed values; and (2) the entry of a decree either (a) disapproving the plan as not fair and equitable, or (b) remanding the plan to the Commission for reconsideration and redetermination in the light of the changed circumstances and other factors; and a hearing having been held before this court with respect to such motion on November 2, 1945, at which hearing Kent Cochran, Carl P. Dennett and Claude Pearce (owners of Prior Preference and $4 Preferred Stocks of Standard who had previously appeared in the proceeding in proper person) appeared through their counsel, who were also counsel for the proposed intervenors Johnson, et al., in support of the motion and pleading of the proposed intervenors; and

The Commission having brought on for hearing at the same time for settlement a proposed form of decree approving and enforcing the plan; and

The aforementioned owners of Prior Preference Stock and $4 Preferred Stock having appeared at said hearing on November 2, 1945, by their attorneys Philip W. Amram, Alfred Berman and Arthur G. Connolly, Esqs., and Guggenheimer & Untermyer; and the Commission having appeared by its attorney, David K. Kadane, Esq.; Standard having appeared by its attorneys, A. Louis Flynn and J. K. Javits, Esq., and Robert H. Richards, Sr. and C. A. Southerland, Esqs.; Guaranty Trust Company of New York, Trustee, having appeared by its attorneys, Davis, Polk, Wardwell, Sunderland & Kiendl and Thomas O'G. FitzGibbon and Paul P. Eagleton, Esqs.; Frank Bailey, Union College, et al., having appeared by their attorneys, Holthusen & Pinkham and Spencer Pinkham, Esq., and James R. Morford, Esq.; Standard Power &

Light Corporation having appeared by its attorneys, Seibert & Riggs, and Murray Taylor, Esq.; A. O. Stewart, et al., having appeared by their attorneys Pam, Hurd & Reichmann and Sydney K. Schiff, Esq.; and Albert J. Fleischmann, Esq., having appeared in his proper person.

All parties having been heard in extended oral argument and briefs having been filed and considered by the Court; and

Thereafter, but prior to any decision by the Court upon said matters Standard having filed on December 3, 1945 a motion praying this Court to enter an order (1) finding, adjudging and decreeing that the plan pending before the Court is unfair and inequitable; and (2) dismissing the application by the Commission for enforcement of the plan, and said motion having come on for hearing December 11, 1945, at which time the interested persons named above again appeared, together with A. David Schenker appearing in his proper person, and were heard in oral argument through their counsel, as stated, and in addition, Vallerie Lathrope Dauphinot, the owner of various Notes and Debentures (who is also seeking to intervene) having appeared and been heard through her attorney, Edward D. Steel, Jr., and briefs having been filed and considered by the Court;

The Court having considered the entire record in this matter and having heard argument of counsel and being fully advised in the premises; and having heretofore filed its memorandum, this day, now makes the following

Findings of Fact

1. This Court has jurisdiction of this proceeding by virtue of the provisions of Sections 11 and 18(f) of the Public Utility Holding Company Act of 1935.

2. All persons whose rights are affected by the Amended Plan have had due notice and opportunity for hearing as provided by law.

3. Standard is a Delaware corporation registered as a public utility holding company under the Act.

4. The Commission heretofore made application to this Court by filing its petition at the request of Standard pursuant to Section 11(e) of the Act, for an order enforcing the Amended Plan. The Amended Plan, among other things, provides for the following treatment of the security holders of Standard:

(a) The holders of the various issues of notes and debentures of Standard and Standard Power and Light Corporation referred to above (which notes and debentures will be referred to hereinafter as "the notes and debentures") are to receive, for each $1000 principal of notes or debentures, $304.95 in cash and three shares of common stock of Pacific Gas and Electric Company, twelve shares of Common stock of Oklahoma Gas and Electric Company, five shares of Common stock of The California Oregon Power Company, two shares of Common stock of Mountain States Power Company and eighteen shares of Common stock of Wisconsin Public Service Corporation, all of which stocks have been assigned an aggregate value of $695.05 (which includes an adjustment of "basic values" of $5.05), without compensation for or on account of call premiums on the debentures.

(b) The holders of the $7 and $6 Prior Preference Stocks, as a single class, are to receive an aggregate of approximately 95% of a new issue of common stock of Standard in lieu of the presently outstanding $7 and $6 Prior Preference stocks and of all rights to dividends accumulated and in arrears thereon.

(c) The holders of $4 Preferred stock are to receive, as a class, the remaining aggregate of approximately 5% of the aforesaid issue of new common stock of Standard in lieu of the presently outstanding $4 Preferred stock and of all rights to dividends accumulated and in arrears thereon.

(d) The holders of common stock do not participate in the distribution of securities under the Amended Plan or otherwise.

(e) As between the $7 Prior Preference stock and the $6 Prior Preference stock, the division of new common stock is to be in the ratio of ten and one-half shares of new common stock for each share of $7 Prior Preference stock and all dividends accumulated and in arrears thereon to nine shares of new common stock for each share of $6 Prior Preference stock and all dividends accumulated and in arrears thereon.

5. Standard requested the Commission to withdraw its application to this Court for an order enforcing the Amended Plan.

6. The value of the shares of stock to be delivered to the Noteholders under the provisions of the Amended Plan has increased to such an extent since the Amended Plan was approved by the Commission on November 15, 1944, has since the entry by this Court on March 29, 1945, of a decree making certain Findings of Fact and Conclusions of Law relative to the Amended Plan, that it may require a reexamination of the Amended Plan to test whether it is fair and equitable to the persons affected thereby.

7. Evidence submitted in the form of affidavits and offers of proof, in the form of admissions of counsel, and in the form of facts, of which the Court was requested to and did take judicial notice, indicates that the portion of the portfolio securities of Standard, proposed in the Plan to be distributed to the Noteholders in partial discharge of their claims, have a current actual and market value substantially in excess of that part of the claims of the Noteholders to be discharged thereby. Estimates of the amount of such excess vary between a minimum of $12,250,000.00 and a maximum of $30,000,000.00

8. Standard has proposed that in lieu of distributing said portfolio securities to the Noteholders, as provided in the Amended Plan, it proposes to call and redeem such Notes, in accordance with their terms, and it has established that it is attempting to make arrangements with responsible banking groups to obtain the cash for such purpose; and Standard will thereby discharge the claims of the Noteholders in accordance with their terms.

9. The program of Standard provides for the exercising by Standard of the option reserved to Standard, in the Notes and in the indentures pursuant to which they were issued, to redeem the Notes prior to their maturity. The "debentures" are redeemable at the principal amount thereof, the premiums thereon specified in the indentures and accrued interest to the date of redemption; the "notes" are redeemable at the principal amount thereof and accrued interest thereon, without the payment of any premium.

10. As evidence of its desire to redeem the Notes, Standard has made formal application to the Commission for the approval of a proposed loan and a program contemplating redemption and payment in cash of all of the outstanding notes and debentures.

11. Christian A. Johnson, Al. P. Johnson, and Jean Johnson, owners of Prior Preference and $4 Preferred stock of Standard having appeared individually and also for the benefit of all holders of the $7 Prior Preference Stock, the $6 Prior Preference Stock, and the $4 Preferred Stock of Standard, have filed a motion for leave to intervene in the proceedings, and have urged in oral argument and by briefs and memoranda, that the proposed plan is unfair and inequitable to the shareholders of Standard as a group vis-a-vis the Noteholders, Kent Cochran, Carl P. Dennett, and Claude Pearce, owners of Prior Preference and $4 Preferred Stock of Standard have joined in and supported said motion, arguments, briefs and memoranda.

12. The value of the equity of the stockholders of Standard in its assets have largely increased in value since the approval of the Amended Plan by the Commission on November 15, 1944, and since the entry by this Court on March 29, 1945 of the decree hereinbefore mentioned.

The conclusions of law of the Court are embodied in the following decree:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the petition of Christian A. Johnson, Al. P. Johnson and Jean Johnson, individually and also for the benefit of all holders of $7 Prior Preference Stock, of $6 Prior Preference Stock and of $4 Preferred Stock of Standard is granted and they are permitted to become formal parties to this proceeding. The petition of intervention of Vallerie Lathrope Dauphinot to intervene and become a formal party to this proceeding is likewise granted.

2. Standard has the right to make a call for redemption of the Notes outstanding in accordance with the provisions of the indentures pursuant to which the Notes were issued, provided Standard files appropriate application or declarations with the Commission and takes such other steps as are necessary to make a call.

3. Standard's method of calling its Notes for redemption in accordance with the various indentures under which said Notes were issued or its arrangement for calling the same shall be with the approval of the Commission.

4. This proceeding is remanded to the Commission for further proceedings not inconsistent herewith.

5. When, if and after the call of the Notes has been effectuated, the Commission may fix a date for hearings and receive evidence in order to determine whether any modification should be made in the provisions of the plan respecting the treatment of the various classes of stock of Standard and to make such findings as it deems proper to this court in the event that Standard requests the Commission to apply to this Court for further enforcement of the plan.

6. In the event that no call of the Notes is made within thirty days from the date hereof or within such further time as the SEC may grant, the Commission may apply to reinstate its original petition, praying for such further orders, judgments and decrees as it may deem meet.

Dated: December 29, 1945.

/s/ PAUL LEAHY,
J.